

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period
From July 1, 1941
Through September 30, 1941
Volume XXIV

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55 Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from July 1, 1941 through September 30, 1941.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also provides a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
THOMAS S. LAWSON,
Attorney General.

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OPINIONS

July 2, 1941.

Hon. Addie Lee Farish,
State Superintendent of Banks,
Capitol.

Banks and banking—Census—

Minimum amount of capital stock, actually paid in, of banks hereafter organized in this state is based upon the population classification provided for in Code of Alabama, 1940, Title 5, Section 78, which population classification is governed by 1930 federal census (no state or municipal census being available) until the ninetieth day after the first day of the first regular legislative session held next after the publication by the Federal Government of the regular Federal Decennial Population Census for Alabama, and after that date by the 1940 federal census.

Opinion by Assistant Attorney General Screws.

Dear Miss Farish:

Your letter of May 27, 1941, requesting my official opinion follows:

"Application is made for an official ruling of your office on the questions hereinafter set out.

"Section 6336 of the Code of Alabama as amended is as follows:

"'No bank hereafter organized under the laws of Alabama shall have a capital stock, actually paid in, less than the following; in cities, towns and villages of less than 3,000 population, \$25,000.00; in towns and cities of 3,000 to 6,000 population, \$50,000.00; in cities and towns of 6,000 to 50,000 population, \$100,000.00; in cities of over 50,000 population, \$200,000.00. For the purposes of this section, the last preceding federal, state or municipal census may be used.'

"Senate Bill No. 221-Lusk—General Laws of the Legislature of Alabama, Session of 1939, Page 388, provides as follows: 'That the 90th day after the first day of the first regular legislative session held next after publication by the Federal Decennial population census for Alabama is hereby fixed as the date for any RECLASSIFICATION under any law requiring classification based on such said census.'

"I am informed that the official figures of the last federal census relating to the State of Alabama were released on January 7, 1941, which census is broken down so as to cover cities and towns in their classifications according to population.

"This office has the application for state bank charters from several towns in Alabama. In each of these localities there is a difference in

population according to the federal census of 1930 and the federal census of 1940, there being available no state or municipal census covering these several locations.

"First; Is the minimum amount of capital stock of the proposed bank to be determined by the federal census of 1930 or the federal census of 1940 as released on January 7, 1941?

"Second; Do the provisions of the above quoted Senate Bill No. 221 apply to Section 6336 of the Code of Alabama, as amended?

"Third; Is the determination by this office of the minimum amount of capital stock necessary to be paid in prior to the granting of a charter to a state bank, a re-classification within the meaning of said Senate Bill No. 221?"

In answer to your first inquiry, it is my opinion that the minimum amount of capital stock, actually paid in, of the presently proposed bank is to be determined by the federal census of 1930. After the ninetieth day after the first day of the first regular session of the next legislature, the official 1940 federal census will govern the minimum amount of capital stock of a proposed bank. You state that there is no state or municipal census covering the locations under consideration.

Section 6336 of the Code of Alabama, 1923, as amended, is now found in Code of Alabama, 1940, Title 5, Section 78. Said section is as follows:

"§78. Capital stock of banks.—No bank hereafter organized under the laws of Alabama shall have a capital stock, actually paid in, less than the following: In cities, towns and villages of less than three thousand population, twenty-five thousand dollars; in towns and cities of three thousand to six thousand population, fifty thousand dollars; in cities and towns of six thousand to fifty thousand population, one hundred thousand dollars; in cities of over fifty thousand population, two hundred thousand dollars. For the purposes of this section the last preceding federal, state or municipal census may be used."

The 1939 legislature enacted a statute particularly applicable to laws requiring re-classification based on federal census. This is Act No. 233, s. 221, approved August 16, 1939, (General Acts, 1939, page 388), which appears in Code of Alabama, 1940, Title 1, Section 14, and provides as follows:

"§14. Re-classification date.—The ninetieth day after the first day of the first regular legislative session held next after the publication by the federal government of the regular federal decennial population census for Alabama is hereby fixed as the date for any re-classification under any law requiring classification based on such said census."

The effect of Section 14, supra, is to postpone the effective date of the 1940 federal census in regard to classification statutes until the ninetieth day after the first day of the first legislative session next after publication

by the federal government of the regular federal decennial population census for Alabama.

In view of the foregoing, it follows that the classification as set out in Code of Alabama, 1940, Title 5, Section 78, supra, is governed by the 1930 census until the 1940 federal census becomes effective in accordance with the provisions of the Code of Alabama, 1940, Title 1, Section 14, supra. Quarterly Report of Attorney General, Vol. XX, pages 47, 143, 156, 351; Quarterly Report of the Attorney General, Vol. XXI, page 233.

It might be well to state that Code of Alabama, 1940, Title 5, Section 78, supra, is applicable only to banks hereafter organized and has no application to those already in existence. Quarterly Report of Attorney General, Vol. V, page 13.

In view of the foregoing answer to your first inquiry, it is unnecessary to answer your second and third inquiries.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 3, 1941.

Hon. J. H. Hamill,
Secretary-Treasurer,
Board of Plumbers Examination & Registration of Alabama,
1020 Massey Building,
Birmingham, Alabama.

Plumbers—Licenses—Veterans—Article 17, Title 62, Code of Alabama, 1940—

1. Under Plumber's Act for Jefferson, Mobile and Montgomery counties, it is not unlawful for one to act as journeyman plumber or master plumber outside of any incorporated town, village or city or the police jurisdiction thereof in such counties without a license from the Board of Plumbers Examination and Registration of Alabama.

2. Veteran's Exemption Act is applicable to license fees required by the Plumbing Act.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

I have divided your request of January 10, 1941, for an opinion from this office into three divisions and this opinion is limited to a consideration of the following questions:

"1. Question: Under the Acts of 1935, p. 995, is a person subject to arrest and fine who does plumbing work as defined in the Act in the County having a population of eighty thousand or more, but outside of the incorporated municipality, town or village in said county?

"2. Question: (a) Is the Board confined in its jurisdiction to violations of the Plumbing Act of 1935 that are committed within the limits of an incorporated town, city or village? (b) If the ruling is that they are so confined, does this power extend to the police jurisdiction of said incorporated town, city or village, and to what distance does said police jurisdiction extend?

"3. Question: Is the Veteran's Exemption Act of 1935 applicable to the license fees required by said Plumbing Act?"

Your questions show that they are based on Act No. 472, H. 409, approved September 13, 1935, (General Acts, 1935, pages 995-1002). 'This act, with the exception as to population and number of members of the board, is practically identical with Act No. 628, H. 1138, approved August 4, 1931, (General Acts, 1931, pages 764-770). Sections 12 and 13 of each act are exactly the same. We may here mention that this later enactment has been held to be constitutional by our Supreme Court. *State ex rel Shirley v. Lutz et al.*, 226 Ala. 497, 147 So. 429. This enactment, in a very substantial way, has been brought forward into the Code of Alabama, 1940. It is to be found in Volume 10, Title 62 of this code under the general heading of "Miscellaneous Laws."

In Chapter 1, Section 1, the scope of all the enactments to be found in Title 62 are defined, wherein it is said:

"This title is composed of laws applying to less than the whole state. They relate to particular subdivisions and classifications of subdivisions of the state as may be designated in the several chapters and articles contained in this title. Their application is limited solely to that particular subdivision or classification so described or designated in the chapter or article in which they are contained, and have no application outside of such particular subdivision or classification."

The effect of this codifying is to do away with the necessity of setting out the titles to the various acts and also made it unnecessary to incorporate specific language prescribing territorial limits of its provisions.

The plumbing law under consideration is codified under Title 62 of the Code of Alabama, 1940, in Article 17, Sections 115-128. The law is treated under what is termed Subdivisions 1 and 2. Section 115 of Subdivision 1 composes the whole of Subdivision 1 and reads:

"§115. Application of article.—The provisions of law contained in this article shall be applicable only to Jefferson, Mobile and Montgomery counties."

Subdivision 2 is composed of Sections 116-128. Sections 116, 117 and 118 provide for the creation and appointment of a board known as a Board of

Plumbers Examination and Registration of Alabama, terms of their office, the organization of the board and times of meetings, the granting of power to the board to make rules and regulations and to keep books or records showing lists of applicants for registration and licenses, etc.

Section 119 defines certain terms used in the act. It defines a "journeyman plumber" to mean and to include any person (other than master plumber) who, as his principal occupation, is learned in the actual, practical, physical installation of plumbing as a handicraft or trade. It defines a "master plumber" as any person, firm or corporation engaged in or proposing to engage in the business of contracting to do or superintending the installation of plumbing, either or both.

Sections 120 and 121 provide for the compensation and manner of payment of the members of the board and the making of a bond for the secretary-treasurer who must be a member of the board.

Section 122 has to do with granting temporary permits to those applying for examination and license.

Sections 123 and 126 set forth the manner of applying to the board for examination and license, the character examination and the granting or refusal of license.

Section 124 requires that the holder of a master plumber's license shall display at his place of business a sign bearing his name and the words "licensed master plumber."

Section 125 makes provision for filing of complaints with the board calling for an investigation or hearing by the board to determine whether the holder of a license has obtained his license through error or fraud or whether he is in fact incompetent or has wilfully violated any of the provisions of the enactment. The section gives such a licensee a hearing and right to offer evidence on the charge or charges.

This brings —us to Sections 127 and 128 of the Code of 1940, Title 62, which sections are the same as Sections 12 and 13 of the act of 1935 referred to above. I have made a rather extended reference to all these sections so I may the better examine and understand Sections 127 and 128.

The provisions of the law now under consideration must not be confused with the vocational license tax on plumbers provided for in Code of Alabama, 1940, Title 51, Section 574. The law under consideration has for its purpose the securing of competent and skilled parties to do plumbing work and experienced and competent plumbing contractors and superintendents and furnish them with evidence of their competency by an authoritative state board. Title 51, Section 574 of the Code of 1940, above noted, has no such purpose. Its purpose is to levy a vocational tax on the privilege of doing business as a plumber. This statute is not concerned as to whether the parties are fit or capable, experienced or otherwise. It takes no note of these things. It specifically licenses the party to engage in such business in towns and cities as well as "in all other places, whether incorporated or not." The

statute now under review belongs to the same class of legislation that requires physicians and lawyers to be examined by authoritative boards as to their qualifications and receive a certificate or license evidencing such qualifications.

I see no conflict between Sections 127 and 128. Section 127 simply makes it unlawful for a journeyman plumber or a master plumber to pursue their business or trade "within any incorporated town, village or city in any such county in the State of Alabama unless regularly licensed so to do as provided by this subdivision." The expression "this subdivision" necessarily refers to the subdivision under which Section 127 is found, that is to say, under Subdivision 2 beginning with Section 116 and ending with Section 128. Under this plain language, it is unlawful for a journeyman plumber or a master plumber, defined by this Subdivision 2, to do or perform or to contract, direct or superintend any plumbing within the places named in the section without the license provided for in said Subdivision 2. It has been suggested that the expression "within any incorporated town, village, city" leaves the provision uncertain. This suggestion fails to take into consideration what immediately follows the quoted phrase, "in any such county." "Such county" necessarily refers to the counties of Jefferson, Mobile and Montgomery, the counties covered by the enactments under consideration. In fact, the act expressly says in effect the same. If this is not true, then the expression "such county" is useless and meaningless. This section fixes no penalty for the unlawful acts therein created and it is to be aided and completed by the provisions in Section 128. This latter section makes provision for punishment for the unlawful acts set forth in Section 127. It says:

"Penalty.—Any person who shall engage in the business of master plumber or in the trade of journeyman plumber for compensation or reward in any such county without first obtaining the license required by this subdivision, *** shall be fined not less than ten dollars, and not more than five hundred dollars for each offense, and each day's violation shall constitute a separate offense."

It will be noted that I have omitted from this quoted section other provisions but they have no connection with nor do they form any part of the provisions with reference to journeyman plumbers or master plumbers doing acts or business without a license. The omitted provisions fix the punishment for the violation of other provisions of the law here under review. There are many acts required and forbidden under the law. Notice of a few will illustrate the point.

Section 124, as we have heretofore noted, requires every holder of a master plumber's license to display at the entrance of his place of business a sign bearing his name, etc.

Section 128 fixes the punishment for failure to do so.

Section 123 requires an applicant for examination and license to give his age, nativity, color and the length of time he has been engaged in the practice of the calling and that he shall sign the application. This, of course, is with the view of furnishing the board with evidence as to whether or not a license should be granted him.

Section 128 provides for the punishment for false statement in his application.

Section 126 sets forth more fully the matters and things to be ascertained on the examination for a license. The wrongs of the applicant committed under this examination is punished under Section 228 under this clause, "or who shall knowingly and wilfully make any false statements to the board concerning his application to or his examination by the board with intent to deceive" by providing that such act shall constitute a misdemeanor and authorizes the cancellation of his license and also the imposition of the fine that is made common by the act to all violators. Section 128 uses the phrase "in any such county." This, of course, refers to the counties of Jefferson, Mobile and Montgomery because they are the only counties that are being dealt with by the enactment. The question may be urged that Section 128 refers to the counties and makes no mention of towns, villages and cities. The first part of the section undertakes to impose the punishment for acts done by journeyman plumbers and master plumbers without first obtaining the license required by "this subdivision." There is no provision to be found anywhere in either of the subdivisions covering the law under consideration that requires the obtaining of a license except in Section 127.

The first part of Section 128 is undoubtedly referring to and dealing with the same parties, to wit, journeyman plumbers and master plumbers as is described in Section 127. So the license referred to in Section 128 finds application only in Section 127 wherein it is made unlawful for the same parties named in the first part of Section 128 "to do or perform or to contract, direct or superintend any plumbing within any incorporated town, village or city." It must needs be that it refers to Section 127, otherwise the unlawful acts declared in Section 127 are rendered nugatory for lack of a penalty or punishment. The codifiers of the law evidently so considered, as Section 127 refers to "violations" and Section 128 to "penalty." These provisions are penal and must be strictly construed.

I am to the conclusion that under the law here under review a party is not guilty of a crime for doing plumbing acts or making contracts therefor or superintending the same outside of an incorporated town, village or city without the license required by Section 127. In fact, Section 127 only makes it unlawful to do such work without a license in a town, village or city.

The next question is what is the meaning of the word "within" as used in the phrase "within any incorporated town, etc." Does it mean within the territorial boundaries of the incorporated city or town or does it apply to the police jurisdiction of the municipalities? The recent edition of Webster's Unabridged Dictionary gives a number of definitions of the word "within." The one which seems to be most applicable here is, "Lying inside certain walls or boundaries." Much depends upon its associate words where it is used. In the present case it is used to define or designate a given territory, i. e., a territory within the corporate limits of the town or city. Acts incorporating the municipality necessarily prescribe its location by designated boundaries and such designated boundaries constitute the incorporated town, village or city. So described, it is dealt with as an entity.

Title 37, Section 9 of the Code of Alabama, 1940, confers police jurisdiction on municipalities on territory outside of the city limits but adjoin-

ing the same. Our appellate court has declared that this act authorized the City of Decatur in Morgan County to levy a license tax within the three mile limit of territory adjoining the city, although that extended into Limestone County. **White v. City of Decatur**, 225 Ala. 646, 144 So. 873; **White v. City of Decatur**, 25 Ala. App. 274, 144 So. 872.

Applying this doctrine, then the police jurisdiction would or might require a plumber license under this law for a county outside of Jefferson, Mobile and Montgomery counties. The law here under review certainly did not mean such a thing as that because it says that the requirements of the act only apply to the three counties named. So I am forced to the conclusion that Section 127 refers to the charter territorial limits and boundaries and not to police jurisdiction over territory outside of the city but adjoining it. The law simply means what it says, "within the incorporated town, village or city" and does not include adjoining territory over which the municipality has police jurisdiction. I have been unable to find any opinions of our appellate courts or of this office wherein the questions here involved have been considered.

Your third question has heretofore been answered in the affirmative by an opinion of this office found in Quarterly Report of the Attorney General, Vol. II, page 229. The Veteran's Exemption Act of 1935 (General Acts, 1935, page 1057) appears in the Code of Alabama, 1940, as Title 51, Sections 852-864.

I regret the length of this opinion but it has seemed necessary for a full consideration of the law involved.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 3, 1941.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Filing Tax—Mortgages—National Bank—Exemptions—

Mortgage executed to national bank as trustee, securing debt to said bank and also debt to other creditor is subject to the mortgage filing tax imposed by Code, 1940, Tit. 51, §619 only as to the amount of the latter debt.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated June 20, 1941, follows:

"I should very much appreciate it if at your earliest convenience you would let me have your opinion as to whether or not the tax imposed by Title 51, Section 619 is due on the recordation of a certain mortgage given to The First National Bank of Birmingham as Trustee.

"The mortgage in question secures loans aggregating \$500,000 principal amount. \$450,000 principal amount of such aggregate represents a loan made to the Jefferson Building & Realty Company by The First National Bank of Birmingham in its individual corporate capacity. In evidence of that loan the Jefferson Building & Realty Company delivered to the said National Bank twenty-one notes dated June 16, 1941, payable to the order of the said National Bank and serially maturing semi-annually from December 16, 1941 to June 16, 1951.

"The said mortgage, in addition to the aforesaid loan made by the said National Bank in its individual corporate capacity, secures a loan made to the said Jefferson Building & Realty Company by the persons designated therein as 'Comer Trustees' in the principal amount of \$50,000. The last said loan also is evidenced by a note executed by the Jefferson Building & Realty Company to the order of the said trustees to mature on April 1, 1966.

"Insofar as the mortgage secures the two said loans the lien of the \$450,000 loan made by the said National Bank in its individual corporate capacity is prior and superior to the lien of the loan made by the said Comer Trustees. Since the mortgage on its face is made to The First National Bank as Trustee, I was uncertain whether or not the tax imposed by Title 51, Section 619 should be measured by the entire amount of the loans secured thereby or only by that part of such loan so secured not made by the bank in its individual corporate capacity. I therefore demanded payment of the tax measured by the entire amount of the loans, and The First National Bank of Birmingham paid that part of the tax measured by the amount of its loan under protest in accordance with Title 51, Sections 890-891.

"For your information I enclose a copy of the letter of protest delivered to me by The First National Bank of Birmingham at the time such tax was paid, together with a copy of a written opinion of their counsel expressing their views in connection with this matter.

"I should very much appreciate it if at your earliest convenience you would render me your opinion whether the tax imposed by Title 51, Section 619 should in this instance be measured by the entire amount of the loan secured by the mortgage offered for recordation, or merely by that part of the loan so secured not made by the National Bank in its individual corporate capacity."

In an opinion dated November 28, 1932 to Hon. E. A. Hammett, Biennial Report, Attorney General, 1932-34, page 46, this office held that where a na-

tional bank was a trustee merely and held none of the debt secured by a mortgage executed to itself as trustee the mortgage filing tax was due to be paid.

On the other hand, it is well settled that a mortgage made to a national bank to secure a debt due said bank is exempt from payment of the tax, on the well established principle that such banks and other federal agencies or instrumentalities are subject only to such state taxation as may be permitted by Congress. U.S.C.A., Tit. 12, §548; *Crosland v. Federal Land Bank*, 261 U. S. 374; 67 L. ed. 703; *Pittman v. Home Owners Loan Corp.*, 308 U. S. 21; 84 L. ed. 16; Quarterly Reports of Attorney General, Vol. XVII, page 218; Vol. XIX, page 291.

Had the mortgage now in question been made to The First National Bank of Birmingham, without addition of the words "as trustee," and without provision for securing the \$50,000 of other debt to the Comer Heirs, there could be no question that the debt of \$450,000 thereby secured, due to the mortgagee by the mortgagor, would be exempt from payment of the mortgage filing tax.

The fact that the mortgage reads to the bank as trustees, and in addition to securing the bank's debt, secures also another debt in which the bank is not beneficially interested, save as trustee, is not in my opinion sufficient to alter this result. After all there is no escape from the fact that whatever the form of the mortgage or deed of trust offered for record all but \$50,000 of debt secured thereby is the bank's debt and as such exempt from the tax, upon the strength of the authorities, *supra*.

As said in *Pittman v. Home Owners Loan Corp.*, *supra*:

"We think that this term (loans), in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom, and the mortgages given to the corporation as security." (Emphasis added.)

You are therefore advised that the tax on the mortgage, referred to in your letter, under Code, 1940, Tit. 61, §619, is to be based on the debt of \$50,000 therein referred to and that as to \$450,000 of the \$500,000 debt thereby secured, said mortgage is exempt from tax.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 3, 1941.

Hon. A. H. Collins,
State Superintendent of Education.
Capitol.

Schools and School Districts—Elections—

Under Code of Alabama, 1940, Title 52, Section 254, two hundred is the minimum number of qualified electors who must sign a petition to the county governing body to order an election to be held to determine whether or not a special county-wide three mill tax shall be levied for public school purposes within said county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 27, 1941, in which you request my official opinion as follows:

"Section 254 of Title 52 of the Alabama School Laws, Code of Alabama 1940 provides for the calling of an election for the levy of the three mill special tax for public school purposes. Immediately after that section is an annotation which reads as follows:

"Petition or request is necessary.—In the case of county wide three mill tax elections, a petition signed by two hundred fifty qualified electors of the county is necessary before the court of county commissioners or other governing body can call the elections. In the other two cases the request of the county board of education or the city board of education, as the case may be, is sufficient. When such requests are made the elections are called by the court of county commissioners or other governing body in compliance with the requests. Rep. Atty. Gen., 1934-36, p. 641."

"However, the reply of the Attorney General contains the following statements:

"Upon a petition signed by two hundred or more qualified electors of any County to the Court of County Commissioners or other governing body, said Court of County Commissioners or other governing body shall order an election"

"In the case of county wide three mill tax elections, a petition signed by two hundred and fifty qualified electors of the county is necessary before the Court of County Commissioners or other body can call the elections."

"Your opinion is requested on the following question: Is the minimum number of names of qualified electors which must be contained on said petition two hundred or two hundred fifty?"

Code of Alabama, 1940, Title 52, Section 254, reads as follows:

"§254. Calling election for levy of tax.—Upon a petition signed by two hundred or more qualified electors of any county to the court of county commissioners or other governing body, said court of county commissioners or other governing body shall order an election to be held at the time specified in said petition to determine whether or not a special tax shall be levied for public school purposes within said county, and upon request of the county board of education to the court of county commissioners or other governing body, said court shall order an election to be held at the time requested by the said board of education to determine whether or not a special tax shall be levied for public school purposes within any school tax district in the county under the control of such board; and upon the request of any city board of education to the court of county commissioners or other governing body said court shall order an election to be held at the time requested by said board of education to determine whether or not a special tax shall be levied for public school purposes within said city."

Its predecessor was Section 261 of the Alabama School Code of 1927, and the two sections are identical in legal effect.

The opinion cited in support of the annotation under Section 254, *supra*, which is quoted in your letter of inquiry, was rendered to Hon. S. D. Bayer, Superintendent of Education, Greene County, Eutaw, Alabama, under date of April 22, 1936, and appears in Quarterly Report of the Attorney General, Vol. III, page 77, and Biennial Report of the Attorney General, 1934-1936, page 641. In the course of that opinion Section 261, *supra*, was quoted in its entirety, and then the following statement, which is set out in your letter of inquiry, was made:

"In the case of county wide three mill tax elections, a petition signed by two hundred and fifty qualified electors of the county is necessary before the Court of County Commissioners or other body can call the elections."

In view of the plain, clear and unambiguous language of Section 254, *supra*, (Section 261, *supra*) to the effect that the petition shall be "signed by two hundred or more qualified electors," the statement in that opinion, quoted *supra*, to the effect that the petition shall be signed by two hundred and fifty qualified electors" is obviously a typographical error, which is self-correcting inasmuch as Section 261, *supra*, was quoted in the opinion.

The premises considered, you are advised that under Section 254, *supra*, the minimum number of qualified electors who must sign a petition to the county governing body to order an election to be held to determine whether or not a special county-wide three mill tax shall be levied for public school purposes within said county is two hundred rather than two hundred and fifty.

The opinion to Mr. Bayer, *supra*, is hereby modified to conform to the holding of this opinion.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 3, 1941.

Hon. Roy D. Gist,
Clerk, Circuit Court,
Jackson County,
Scottsboro, Alabama.

Courts—Jackson County Court—Cost and Fees—Court Reporter—
Act No. 647, S. 379, approved July 10, 1940 (Local Acts, 1939, p. 368),
construed.

1. Clerk of Jackson County Court proper person to re-register
claims against Jackson County Court Fine and Forfeiture Fund as
required by Section 25 of Act No. 647, supra.

2. Court Reporter's fee of \$5.00 held taxable in each criminal
case in the Jackson County Court only when services are actually
rendered by said court reporter.

3. Clerk of Jackson County Court held not entitled to a fee for
issuance of affidavits and warrants of arrest.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion dated February 6, 1941 follows:

"Will you please render us your opinions on Senate Bill No. 379
(Local Acts of 1939) references made to Section 25 of said Bill? There
has been filed with me before January 10, 1941, Six Thousand (\$6,000.00)
Dollars worth of Fine and Forfeiture Claims that came out of the old
Jackson County Court between the years of 1922 and 1934, these claims
have been registered against the General Fine and Forfeiture Fund of
Jackson County. As Ex-Officio Clerk of the Jackson County Court is
it my duty to re-register these claims against the New Jackson County
Fine and Forfeiture Fund?

"Also to Section 36 and 37 of said Bill shall I as Ex-Officio Clerk
of the Jackson County Court collect a Court Reporters fee of Five (\$5.00)
Dollars on each criminal case where the defendant has plead guilty or is
settled by an agreement where there has been no testimony taken by
the said Official Court Reporter?

"Also to Section 22 of said Bill, am I as Ex-Officio County Court
Clerk entitled to a fee for issuing Affidavit and Complaint if so what
fee am I entitled to?"

It is my opinion that your first inquiry should be answered in the af-
firmative.

Overruled, Modified or distinguished
See vol 70 Page 87

Sections 24, 25 and 26 of Act No. 647, H. 379, approved July 10, 1940 (Local Acts, 1939, page 368) are respectively as follows:

"Section 24. That there is hereby created a Fine and Forfeiture Fund for the Jackson County Court of Jackson County, Alabama, to be known as the Jackson County Court Fine and Forfeiture Fund; and that, from and after the passage of this Act all fines and forfeitures assessed and collected in said Court shall be deposited in said Fine and Forfeiture Fund of the Jackson County Court."

"Section 25. Only claims accruing in the Jackson County Court, will be claims against said fund, and all claims now registered against the General Fine and Forfeiture Fund that originated in the Jackson County Court be re-registered against said Fund within six months after the passage and approval of this Act, else they will be barred against said fund, and such claims must be paid in the order in which they are registered."

"Section 26. The Sheriff and Circuit Clerk's claims originated in the Jackson County Court when registered shall be on par with witness claims against said fund, and all claims against said Fund shall be paid upon certificate of the Clerk of the Jackson County Court stating that such claims have been properly registered and are legal claims against said fund, and the Circuit Court Clerk shall be custodian of said Fine and Forfeiture Fund, and said claims must be paid in the order of registration against said Fund."

It will be noted that Section 26, *supra*, provides that the Circuit Clerk, who is made Ex-Officio Clerk of the Jackson County Court by Section 4 of Act No. 647, *supra*, shall be custodian of the Jackson County Court Fine and Forfeiture Fund provided for in Section 24, *supra*. It is, therefore, my opinion that you, as ex-officio Clerk of said court, are the proper person to re-register against the Jackson County Court Fine and Forfeiture Fund, as required by Section 25, *supra*, the claims referred to in your first inquiry.

In my opinion, your second inquiry should be answered in the negative.

Sections 36 and 37 of Act No. 647, *supra*, are as follows:

"Section 36. That the judge of said court shall appoint a competent person capable of taking the proceedings of said court in shorthand as the official reporter for said court, and shall make an order of such official reporter, when so appointed, shall be removed by the Judge of said Court at his discretion, and his duties shall be the same as are now provided by law for the reporter of the Circuit Courts of the State and he shall receive the same rate of compensation for transcribing the testimony or other proceedings as are now provided for said Circuit Court Reporter, but shall as a salary receive only the amount hereafter provided for in the next succeeding section hereof."

"Section 37. That in all cases in said Court a Stenographer's fee of five dollars shall be charged and collected and by the clerk paid to

the official Court Reporter appointed for said court; provided, however, that in all cases where a money judgment is sought, in civil cases of less than one hundred dollars as determined by the complaint, and in cases where there is a judgment by default, there shall be charged as stenographer's fee only two dollars and fifty cents."

With respect to the question here being considered, it will be noted that Section 36, *supra*, provides in substance that the official court reporter for the Jackson County Court, as a salary, shall receive only the amount provided for in Section 37, *supra*. There is no salary provided for in Section 37, *supra*, but only a provision that a certain designated amount be collected as a *Stenographer's fee* in cases in said court and paid to the official reporter. It is, therefore, my opinion, in view of the words and language employed in these two sections, that I must resort to a construction or interpretation of the said sections so as to arrive at the intent of the lawmakers before I can answer your inquiry. *City of Birmingham v. Southern Express Company*, 164 Ala. 529, 51 So. 159.

In this connection, attention is called to Section 6738 of the Code of Alabama, 1923, which is as follows:

"6738. Fee of five dollars a day taxed as costs in each case.—In all cases reported by an official court reporter or special reporter, there shall be taxed as a part of the costs of the case a fee of five dollars for each day or fraction thereof that such reporter shall be engaged in reporting a case, to be collected as costs as in other cases, and, when collected, paid by the clerk of the court into the county treasury of the county in which the case is tried."

The above quoted section is the general law of the State with reference to the taxing of a court reporter's fee in cases tried in the Circuit Court; and in construing this section, this office has held that such court reporter's fees are taxable only when the services are rendered. *Biennial Report, Attorney General, 1930-32, page 316.*

In view of this construction, together with the further facts that the five dollar fee provided for in said section is similar to that provided for in Section 37, *supra*, and that Section 36, *supra*, provides that the duties of the court Reporter for the Jackson County Court "shall be the same as are provided by law for the reporter of the Circuit Court," it is my opinion that it was the legislative intent that the five dollar stenographer's fee provided for in Section 37, *supra*, should be taxable only when the services are actually rendered. In this opinion, consideration of Section 37, *supra*, is limited solely to the five dollar stenographer's fee provided for therein as it can readily be seen that such fee is the only fee applicable to criminal cases. This being true, it is not necessary to consider the stenographer's fee of two dollars and fifty cents mentioned in said section in order to answer your inquiry.

In answer to your third inquiry, attention is called to Section 22 of Act No. 647, *supra*. Said section is as follows:

"Section 22. Prosecutions for misdemeanors committed in Jackson County may be instituted in this court by making an affidavit before the judge of said court or the clerk thereof, the writ of said affidavit to be issued by the clerk of said court, and when the defendant is arrested on said affidavit, said case shall go on the docket for trial, and be tried as though the defendant had been indicted by a grand jury, provided, that the affidavit or complaint may be amended as now provided by amendment of such papers by Section 3825 of the Code of Alabama."

It will be noted that the above quoted section imposes upon the clerk of the Jackson County Court the duty of issuing affidavits and warrants of arrests, but no fee is provided for said service. Section 4 of Act No. 647, supra, provides that the clerk of the said court is "entitled to the same fees, as are now, or may hereafter be allowed to Circuit Clerks of Alabama," but I can find no provision of law which provides a fee to Circuit Clerks for the issuance of affidavits and warrants of arrest. It is, therefore, my opinion, in view of the fact that the law of costs and fees is penal in its nature and must be strictly construed, (Section 3734, Code of Alabama, 1923) that no fee can be collected by the clerk of the Jackson County Court for issuance of affidavits and warrants of arrest.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 3, 1941.

Hon. J. R. Mitternight,
Revenue and Road Commissioner,
Mobile County,
Mobile, Alabama.

Mobile County—Superintendent of Roads—

1. The appointing power of the Superintendent of Public Roads under the provisions of Act No. 588, S. 479, approved August 2, 1907, Local Acts, 1907, page 727, as amended (not here pertinent) is limited to the appointment of unskilled labor.

2. The provisions of Act No. 588, supra, in regard to letting contracts in excess of \$100 by bids, does not apply to the purchase of road materials, road machinery and other supplies used by the Maintenance Division of the Road and Bridge Department of Mobile County.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated May 28, 1941 follows:

"Our County presently operates under a merit system law which requires appointing authorities to approve payrolls, report absences, make suspensions, and discharge other duties in connection with employees of Mobile County.

"Under the Local Acts of 1907, page 728, an employment was created of a position known as Superintendent of Maintenance. This employee is elected by the Board of Revenue and Road Commissioners and serve for a term of four years at a salary to be fixed by the Board, not less than Eighteen Hundred Dollars per annum. This act provides 'all acts of the Board relating to the method of doing all work must be by formal resolution spread on the minutes of the Board, and no contract shall be let for more than One Hundred Dollars except by calling for bids and awarding the same to the lowest and best bidder.'

"The Act also provides that the Superintendent of Maintenance 'shall have power and authority to hire such number of laborers as may be provided by the Board; to discharge the same; to purchase all stock, machinery, tools and supplies under bids submitted to and approved by said Board.' I understand this Act has been to some extent amended because the Road Tax provided for in the Act is no longer collected in Mobile County.

"Please advise me:

"1. Is the Superintendent of Maintenance the appointing authority for the employees of the Road and Bridge Department, or is his authority limited to unskilled labor?

"2. Does the provision requiring the purchase of bids apply to road material, road machinery and other supplies used by the Maintenance Division of the Road and Bridge Department of Mobile County?"

An answer to your first question necessarily involves the interpretation of Act No. 588, S. 479, approved August 2, 1907 (Local Acts, 1907, page 727), (not here pertinent) and a determination of the appointing power and authority vested in the Superintendent of Public Roads under the provisions of this Act.

Section III of Act No. 588, supra, provides in the part applicable to the Superintendent of Public Roads (whom you refer to in your letter as Superintendent of Maintenance) as follows:

"He shall have power and authority to hire such number of laborers as may be provided by the board. *** and said superintendent may be removed from office for incompetency, misconduct or neglect of duty at any time by said Board."

In view of the above provisions, it is my opinion that in the absence of any showing that the Superintendent of Public Roads is guilty of incompetency, misconduct or neglect of duty, he is primarily responsible for the appointment of laborers for the Road and Bridge Department of Mobile County. In view of the fact that the entire control, management and supervision of the public roads of Mobile County is vested in the Board of Revenue and Road Commissioners of Mobile County, coupled with the fact that the Superintendent of Public Roads may be removed by said board for incompetency, misconduct or neglect of duty, clearly shows that the ultimate responsibility for the employment of these laborers rests in the County Board. Cf. Quarterly Report Attorney General, Vol. XII, page 139; *Thompson v. Chilton County*, 236 Ala. 142, 181 So. 701.

The question now presents itself as to what interpretation is to be placed upon the word "laborers" as used in Section III, hereinafter quoted.

It is a well known rule of statutory construction that words used in a statute are to be given their common, ordinary, understood meaning. *Ex Parte Pepper*, 185 Ala. 284, 64 So. 112; *American Bakeries Co. v. City of Opelika*, 229 Ala. 388, 157 So. 206. The common understood meaning of the word "laborer" is one who works with his hands, applying strength rather than skill.

"When used in its ordinary and usual acceptance, 'laborer' carries with it the idea of actual physical and manual exertion of toil, and excludes anyone whose employment is associated with mental labor and skill."

35 Corpus Juris, page 927, §3.

You are, therefore, advised that in my opinion the appointing authority vested in the Superintendent of Public Roads of Mobile County under the provisions of Act No. 588, *supra*, is limited to the appointment of unskilled labor.

Considering the above in connection with Act No. 470, H. 925, approved September 15, 1939 (Local Acts, 1939, page 298), which act creates the Civil Service for Mobile County, reference is made to the following portion of Section I thereof, and also subsection (7) of Section II, which are respectively as follows:

" 'Appointing Authority', or 'Appointing Power' means a person, officer, board, commission, or other body or persons whose lawful jurisdiction or powers are confined wholly or primarily within the territorial limits of Mobile County, or any incorporated city or town therein, and who or which have the power to make appointments to offices or positions of employment or trust in any of the Classified Service as in this act defined.

"§II. UNCLASSIFIED SERVICE: The following shall be in the Unclassified Service: (7) Common laborers not engaged in regular employment."

It therefore follows that in the case of skilled labor employed in the Road and Bridge Department of Mobile County, the Board of Revenue and Road Commissioners of Mobile County is the appointing authority therefor; and as to those unskilled laborers who are engaged in regular employment in the Road and Bridge Department is the appointing authority for such laborers.

This office in an opinion to Hon. Dan T. McCall, President of Mobile County Revenue & Road Commissioners, under date of August 20, 1938 (Quarterly Reports, Attorney General, Vol. XII, page 139) has answered your second question in the negative. I quote from that opinion in this regard as follows:

"In this connection, out of an abundance of precaution, I direct attention to that provision of Section III that 'no contract shall be let for more than one hundred dollars (\$100.00) except by calling for bids and awarding the same to the lowest and best bidder.' In my opinion, this provision is not applicable to purchase of materials and supplies to be used upon the county roads, nor to the employment of labor therefor. It is applicable only to contracts for county road projects, for example the construction of bridges, culverts, etc."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 9, 1941.

Hon. Roy O. Oliver,
Judge of Probate,
Tallapoosa County,
Dadeville, Alabama.

Officers—Counties—

Member of Court of County Commissioners unauthorized to use county road equipment for private benefit.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 7, 1941, in which you request my opinion as follows:

"It has recently been brought to my attention that two members of the Court of County Commissioners of this County have a grading contract at Childersburg, Ala., and are using County road equipment in this work. The grading is being done in Talladega County. Please advise me whether or not this is permissible under the law. I would like to have this information by July 9th if possible."

I am of the opinion that your inquiry should be answered in the negative. Public property cannot be used for private benefit. Cf. *Stone v. State*, 223 Ala. 426, 136 So. 727.

In connection with your inquiry I refer you to subdivision 3 of Section 231 of Title 41, Code of Alabama, 1940, which provides as follows:

"§221. Misconduct of public officer.—Every public officer who shall:

* * *

"3. Employ or use any person, money or property under his official control or direction, or in his official custody, for the private benefit or gain of himself or another;

* * *

"Shall be fined not more than one thousand dollars and may be sentenced to hard labor for the county for not more than six months, * * *."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 9, 1941.

Hon. G. W. Cuninghame,
Register, Circuit Court,
Marengo County,
Linden, Alabama.

INSANE PERSONS—

1. Duty of court of equity to see that defendant non compos mentis is represented by guardian.
2. A decree rendered without such representation is voidable by timely suit by the non compos mentis.
3. The register is not protected in paying money to non compos mentis in person.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

I have your letter of July 2, 1941, in which you request my opinion as follows:

"By order of Court I have recently sold real estate in this County for Partition and Division among the joint owners thereof, and in making the distribution of the proceeds among the joint owners I find that two of them are of unsound mind and confined in the Insane Asylum in Tuscaloosa, Alabama, and I want you to advise me what disposition I should make of the checks now in my possession and payable to these parties in the said Asylum."

It is not clear from your question whether the bill or record in the case shows that the parties were insane at the time of filing of the bill. If they were at that time insane, then the law provides that they shall be defended by their general guardian if they have one whose interests are not adverse to their interests. If they have no general guardian or his interests are adverse to theirs, then the court must appoint a guardian ad litem. Code of Alabama, 1940, Title 7, Section 177. See Equity Rules 5(c) and 8. The court must see to it that they have a guardian. *Austen v. Bean*, 101 Ala. 133, 16 So. 41; *Howell v. Randale*, 171 Ala. 451, 54 So. 563.

If this record fails to show that the parties were non compos mentis and were not represented by a guardian, any decree rendered in the case is voidable and subject to be set aside or vacated by timely proceedings by them. *Cunningham v. Wood*, 224 Ala. 288, 140 So. 351.

The status of this case not being clear and the probability that serious questions may arise, my opinion is that you should hold the money for further orders and call the matter to the attention of the court trying the cause and rendering the decree and the solicitor of record representing the complainant.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 10, 1941

Hon. Sim L. Howell, Chairman,
Morgan County Board of Revenue and Control,
Decatur, Alabama.

Counties—Airports—Leases—

Morgan County held authorized, together with the City of Athens, Limestone County, and the City of Decatur, to enter into a lease contract for a period of years with a private corporation, for the use of properties in Limestone County, leased by said private corporation, as a municipal airport for Morgan County, and the other political subdivisions, said county having the right to terminate said lease at the end of any leasehold year, without further liability thereunder on its part.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 14, 1941, in which you request my opinion as follows:

"We wrote to you on May 14th, 1941, with reference to your opinion as to Morgan County making expenditures toward the lease of certain land in Limestone County, Alabama, for the establishment of an air training base.

"Your opinion in answer to our letter is dated May 16th, 1941, and with further reference to this opinion we are handing you herewith a copy of a proposed contract to be entered into between the City of Decatur, Morgan County, Alabama, the City of Athens and Limestone County, Alabama, and the Southern Aviation Training School, Inc.

"You will please advise if Morgan County can legally make its proportionate part of the expenditure set out in this contract. We wish to know if you let us have this opinion at the earliest possible time."

The proposed contract which was enclosed in your letter of inquiry provides in substance as follows:

The City of Athens, Alabama; Limestone County, Alabama; the City of Decatur, Alabama; and Morgan County, Alabama, all municipal corporations, are the lessees, and the Southern Aviation Training School, Inc., an Alabama corporation, is the lessor. The lessor has leased certain properties in Limestone County, Alabama, which are operated, or are to be operated, as an airfield, and on which the lessor operates, or is to operate, an aviation training school. Under the proposed contract, the lessor will sublease said properties to said municipal corporations for a period of fifteen years for use by them as a municipal airport, the consideration for the same being a cash payment of \$15,000, and an annual rental of \$5,000, payable in advance, the said cash payment and annual rental to be divided among the lessees in such proportions as will be stipulated in the lease contract. The contract contains provisions for the termination of the lease on the part of the county lessees at the end of any leasehold year without further liability thereunder on their part, and other provisions in regard to the termination of the same not material to your inquiry.

It is my information that Morgan County has funds presently available with which to pay its proportionate share of the cash payment and the first annual rental as provided in the proposed contract.

The presently applicable statutory provisions of this state in regard to municipal airports are contained in Sections 21-36 of Chapter 2 of Title 4 of the Code of Alabama, 1940, which is a codification of the Municipal Airport Act (Act No. 136, H. 288, approved March 10, 1931, General Acts, 1931, page 197).

Section 21 defines the term "municipality" as used in said chapter as "county, city, town or incorporated village of the State of Alabama."

Section 22 thereof provides:

"Municipal airports; authority to establish.—Each municipality of this state is hereby authorized to acquire, establish, construct, expand, own, control, equip, improve, maintain, operate and regulate airports or landing fields for the use of airplanes and other aircraft, either within or without the geographical limits thereof." (Emphasis supplied)

The authority granted to municipalities, including counties, by Section 22, supra, may be exercised by a municipality, including a county, individually, or may be exercised by more than one municipality, including a county, jointly. See Section 35 thereof.

Section 25 thereof provides the methods of acquisition of lands for municipal airports, one of such methods being the "power to acquire a term of years in lands for airport uses." This, in my opinion, is specific authority for a municipality or municipalities, including a county or counties, to lease properties for use as a municipal airport. However, if it is not such power is contained in the broad power granted to them by Section 22, supra, to acquire, establish, construct, expand, own, control, equip, improve, maintain, operate and regulate such airports or landing fields. In my opinion, this authority is broad enough to include the power and authority to lease properties for such purposes. See opinion to Hon. William E. Persons, Director, Department of Corrections and Institutions, Capitol, under date of January 11, 1940, Quarterly Report of Attorney General, Vol. XVIII, page 37, and authorities therein cited, wherein it was held that the power vested in the Department of Corrections and Institutions to purchase lands to be used by the department in working convicts included the authority to lease such lands.

The premises considered, it is my opinion that Morgan County has the authority, together with the City of Athens, Limestone County and the City of Decatur to enter into this proposed lease by virtue of the provisions of Chapter 2 of Title 4, supra, and especially the sections thereof cited or quoted from, unless there are other constitutional or statutory provisions to prevent the same. Cf. Opinion to Hon. S. P. Poyner, Judge of Probate, Houston County, Dothan, Alabama, under date of May 1, 1941, a copy of which has been furnished to you.

If there are such provisions, they are Section 224 of the Constitution of Alabama, 1901, placing a limitation on county indebtedness, and the provisions of Chapter 6 of Title 12, (Sections 73-91) of the Code of Alabama, 1940, which provide for the financial control of counties and limit their power and authority to incur obligations and to approve and pay claims for current operating expenses in any fiscal year to the income of such year available for such purpose. However, inasmuch as Morgan County has funds presently available with which to pay its proportionate share of the cash payment and the first annual rental, and the proposed lease contract contains a provision that the county lessees may terminate the lease at the end of any leasehold year without further liability thereunder on their part, it is my opinion that

this lease does not run counter to the provisions of Section 224, supra, even if Morgan County may have reached its constitutional debt limit, or the provisions of Chapter 6 of Title 12, supra. Cf. the opinion to Hon. William E. Persons, supra, and authorities therein cited, which held that the Department of Corrections and Institutions could enter into what is commonly referred to as a "lease-sale contract" for the acquisition of lands provided such contract did not bind the State of Alabama to purchase the lands, and the contract might be terminated, without liability to the State of Alabama, at any time, without creating a debt prohibited by Section 213 of the Constitution of Alabama, 1901, as amended.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 15, 1941.

Hon. Hunter Phillips,
Judge of Probate,
Choctaw County,
Butler, Alabama.

Filing tax—

There is no deed tax due for the recording of certified copies of patents issued by the Federal Government to various individuals where the original patents in each case were issued prior to October 1, 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 12, 1941, in which you request my opinion as follows:

"I have recently received several certified copies of patents issued by the United States Government to various individuals. The original patents in each case were issued prior to the Code of 1923. Thirteen of these certified copies were recorded for one T. C. Compton and his attorney has raised the question that we should not charge tax on these patents.

"Please advise met at earliest possible date as to whether a tax should be charged or these certified copies of patents."

If the original patents in question were issued prior to October 1, 1923, I am of the opinion that your inquiry should be answered in the negative.

The Code of 1940, Title 51, Section 618, provides in part as follows:

"§618. Deeds, bills of sale, etc.; recordation.—No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this state upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: * * *."

It will be noted that deeds and other instruments or conveyances executed prior to October 1, 1923, are specifically exempted from the deed tax provided for in Section 618, supra. You state in your letter that the original patents in each case were executed prior to the Code of 1923. October 1, 1923, is the controlling date insofar as the time element for the exemption is concerned. It, therefore, follows that if the original patents were issued prior to October 1, 1923, no deed tax will be due when either the original patents, or certified copies thereof, are offered for record. Quarterly Report of Attorney General, Volume XXI, page 148.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 15, 1941.

Hon. Albert W. Gill, Director,
Department of Conservation,
Montgomery, Alabama.

Fish—Licenses—Non-residents—Department of Conservation —
Code 1940, Tit. 8, §§39 and 40, construed.

1. Non-resident, to fish in public waters of the State in which fresh water fish appear, must procure either a non-resident annual fishing license or a non-resident trip fishing license.

2. Non-resident trip fishing license entitles non-resident to fish in public waters of the State in which fresh water fish appear for a period of seven days from day license is issued.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion bearing date of June 28, 1941, is as follows:

"There are several cases now pending in the courts of Alabama regarding interpretation of Title 8, Sections 39 and 40 of the 1940 Code of Alabama. The above cited Sections pertain to non-resident fishing licenses. I quote from Sec. 39 as follows:

" 'Non-residents of this state may procure an annual fishing license, by filing with any person authorized to issue same, '.

"I quote from Section 40, as follows:

" 'Any non-resident of this state may procure a trip fishing license in the same manner provided for other licenses provided in this chapter, '.

"Several of the Judges and Justices of the Peace are of the opinion that the words 'may procure' mean that the procuring is optional. The Department of Conservation has always held that the words 'may procure' mean must procure in the event the non-resident desires to obtain a fishing license.

"I will appreciate your official opinion regarding your interpretation of the words 'may procure' as to their meaning insofar as they apply to a non-resident who desires to obtain a fishing license in the State of Alabama."

In answer to your inquiry, attention is called to Code 1940, Titles 8, §§39, 40 and 41, which are respectively as follows:

§39. Non-resident state fishing licenses.—Non-residents of this state may procure an annual fishing license, by filing with any person authorized to issue same, an affidavit stating applicant's age, place of residence, color, and post office address, and after paying to the person issuing said license a fee of five dollars."

"§40. Non-resident trip fishing license.—Any non-resident of this state may procure a trip fishing license in the same manner provided for other licenses provided in this chapter, by paying therefor the sum of two dollars, which license will authorize the holder thereof to fish in any of the public waters of this state, in which fresh water fish appear, for a period of seven days from the day said license was issued."

§41. Penalty for fishing without license.—Any person for whom a fishing license is required who fishes in the public waters of this state in which fresh water fish appear, without first procuring a license as provided by law, shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not less than ten dollars nor more than twenty-five dollars for each offense."

After a careful consideration of the above quoted sections in connection with the inquiry propounded by you, it is my opinion that before a non-resident may lawfully fish in the public waters of the State of Alabama, in which

fresh water fish appear, he must procure either the non-resident annual fishing license provided for in Section 39, supra, or the non-resident trip fishing license provided for in Section 40, supra. Of course, if he procures the non-resident trip fishing license provided for in Section 40, supra, he would be entitled only to fish in the public waters of this state, in which fresh water fish appear, for a period of seven days from the day said license is issued.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1941.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alcohol—Shipment from without the State—Rules and Regulation of Alabama Alcoholic Beverage Control Board—

1. Shipments of alcohol from without the State to Schools, laboratories and the like must be affixed to the containers the affidavit provided for in Section 177 of Title 27, Code 1940.

2. The Alabama Alcoholic Beverage Control Board is without authority to adopt a rule or regulation requiring schools, chemical plants, laboratories and retail druggists to purchase alcohol from licensed wholesale druggists of this State.

3. Chemical plants, extract companies and retail druggists need not secure a permit from the Alabama Alcoholic Beverage Control Board before purchasing alcohol from distilleries located outside the State.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of May 28, 1941 is as follows:

"On May 29, 1937 the Attorney General's office rendered an opinion to Hon. J. A. Keller, Superintendent of Education, Montgomery, Alabama, holding that 'Under facts stated, State Teachers' College may purchase alcohol for use in their non-commercial laboratories without obtaining a permit from the Alcoholic Beverage Control Board.'

The new Code of Alabama deals with alcohol in Sections 1, sub-section g; Section 2, sub-section c and Sections 74, 175, 176, 177, 178, 183, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199 and 200.

"Under the new Code do all shipments of alcohol to schools, laboratories and the like have to have affixed to the containers the affidavit as provided for in Section 177?

"Does the Alabama Alcoholic Beverage Control Board have the authority to promulgate rules and regulations requiring schools, chemical plants, laboratories and retail druggists to purchase their supply of alcohol from licensed wholesale druggists of this State?

"Please also advise whether or not chemical plants, extract companies, and retail druggists, are required to secure a permit from the Alabama Alcoholic Beverage Control Board in order to purchase grain alcohol from distilleries located outside the State of Alabama."

It is my opinion that all shipments of alcohol to schools, laboratories and the like from without the State must have affixed to the containers the affidavit provided by Section 177 of Title 29, Code 1940. This section is as follows:

"§177. Affidavit of person desiring to have alcohol or wine shipped to him—Any person desiring to have shipped to him under the laws of Alabama, alcohol, or wine for sacramental use, shall make an affidavit before an officer in Alabama authorized to administer oaths, stating the quantity of such alcohol or such wine that the said party desires to receive; the use to which either the wine or the alcohol is to be put, and that the person seeking the shipment is authorized under the laws of Alabama to have, receive and possess such quantity of alcohol or wine as is shipped and that the shipment is sought of a legal quantity and for a bona fide legal purpose, permitted under the laws of Alabama, and for no other purpose, and a copy of said affidavit shall be pasted or permanently attached to the container of the alcohol or wine, when the same is shipped into the State of Alabama, and is received by said applicant from the carrier."

It is true that in the opinion rendered to Hon. J. A. Keller, Superintendent of Education, under date of May 29, 1937 (Quarterly Report of Attorney General, Vol. VII, page 170), it was held that the State Teachers' College was authorized to purchase alcohol from chemical companies for use in its non-commercial laboratory without obtaining a permit from the Alabama Alcoholic Beverage Control Board, for the reason that Section 58 of the Alabama Beverage Control Act operated to expressly exempt such purchases from the provisions of such act. However, the opinion did not consider the applicability of the provisions of Section 4708 of the Code of Alabama, 1923 (§177, Tit. 29, Code 1940), prescribing the method of obtaining alcohol where it is desired to have such alcohol shipped from without the State and cannot, therefore, be held conclusive of the proposition you now present.

It would seem that since no procedure is provided by the Alabama Beverage Control Act for the purchase of such alcohol from without the State,

reference must be had to §177 of Tit. 29, Code of Alabama, 1940, therefor. Cf. Opinion to Hon. Matt A. Boykin, Judge of Probate, Mobile County, under date of August 16, 1937 (Quarterly Report of Attorney General, Vol. VIII, page 113).

In the opinion to Judge Boykin you will note that it is stated:

"I do not think that Section 58 of the Alabama Beverage Control Act deals fully and completely with the entire subject of Sections 4736-4739 of the 1923 Code of Alabama, so as to take the place of and repeal the same. See opinion of this office to Hon. J. A. Keller, Superintendent of Education, under date of May 29, 1937, a copy of which is enclosed for your convenience."

Apparently, therefore, the Boykin opinion tacitly recognizes the fact that Sections 4708 (§177 Tit. 29, Code 1940) must be resorted to for the procedure to be followed by a person having alcohol shipped to him from without the State.

Your attention is called to the fact that this office has therefore held that Section 4708 of the Code of Alabama, 1923 (§177 of Tit. 29, Code 1940), is limited to shipments made from without the State. See the enclosed copy of opinion rendered to Hon. James F. Hawkins, Sheriff, Jefferson County, under date of February 27, 1934 (Opinions of Attorney General, Office Edition, Vol. 17, page 40).

You are therefore advised that, with respect to shipments of alcohol from without the State, the provisions of §177 of Tit. 29, Code 1940, must be complied with in both "wet" and "dry" counties.

Your second inquiry must be answered in the negative. I have carefully considered the provisions of the Code of 1940 relative to the purchase of alcohol, and have given careful study to those provisions of the Code authorizing the Alabama Alcoholic Beverage Control Board to adopt rules and regulations in an effort to find "legislative mandate for the adoption of such rule," but find no such authority. You are therefore advised that your Board may not promulgate a rule such as that concerning which you inquire. Cf. **Thompson v. Alabama State Milk Control Board**, 1 So. 2d. 381; **State v. Vaughan** (M.S.), Court of Appeals.

Your third inquiry must likewise be answered in the negative. I have found no statutory provisions requiring that a permit be obtained in such cases. This office has heretofore held (Quarterly Report of Attorney General, Vol. XII, page 39; Quarterly Report of Attorney General, Vol. VII, page 170), with respect to Section 58 of the original Alabama Beverage Control Act (§74 of Tit. 29, Code 1940), that such section expressly exempts from the provisions of the Alabama Beverage Control Act purchases made for the purposes therein enumerated. I do not find that in codifying the laws pertaining to intoxicating liquors the legislature has inserted provisions changing this con-

clusion so as to require permits to be secured from the Alabama Beverage Control Board under the circumstances concerning which you inquire.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 18, 1941.

Mr. S. C. Blackshear, Secretary,
Alabama Pension Commission,
Montgomery, Alabama.

Confederate Veterans—Burial Expenses—

The cost of a burial lot and tombstone suited to the condition of the estate is a proper charge against the proceeds of a Confederate pension warrant, as part of "burial expenses." Code 1940, Title 60, §35.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of July 1, 1941, is as follows:

"Section 35, Title 60, of the 1940 Code of Alabama with reference to payment of Confederate Pensions after death of pensioner, provides that in instances where the pensioner leaves no widow or minor children, the last pension warrant must be used, 'first, to the payment of burial, and second, to the expenses of the last illness of the pensioner'.

"The State Department of Public Welfare in a recent letter to this office has raised the question of whether or not this pension warrant, or any part of same, might be used for the purchasing of a tombstone or the purchasing of a burial lot.

"This office, therefore, is asking for your opinion in the matter."

It is my opinion that the words "burial expenses" include expenses incurred in the purchase of a tombstone and burial lot.

The pertinent portion of Code 1940, Title 60, §35, is as follows:

"should there be no widow or minor child of such deceased pensioner, the county department of public welfare shall endorse such fact on the pension warrant and collect the same and apply the proceeds, first, to the payment of the burial expenses, and, second, to the expenses of the

last illness of the pensioner, attaching thereto a receipt or statement of payment of such expenses, any unexpended balance remaining to be returned to the treasury to the credit of the fund against which the warrant was drawn."

I do not find that either this office or the Appellate Courts of this state have defined the particular items which may be included within the term "burial expenses." Both this office and the Appellate Courts, however, have treated the term "funeral expenses," as employed in Code 1940, Title 61, §218(1), which section makes "funeral expenses" a primary claim against the estates of decedents. The decisions of the Supreme Court considering "funeral expenses" are of assistance in determining the question here presented for the reason that the Court, in dealing with "funeral expenses," has employed the expression "burial expenses" interchangeably. For example, in **Kennedy v. Parks**, 217 Ala. 323, 116 So. 161, Justice Bouldin, speaking for the Court, observes:

"Since **Hatchett v. Curbow**, 59 Ala. 516, the cost of a tombstone suited to the condition of the estate has been held and regarded a proper charge as part of the burial expenses."

In the **Curbow** case, Justice Stone, in concluding that a tombstone was a proper charge as "funeral expenses", reasoned as follows:

"Burial of the dead is a public and private necessity, which, not being otherwise provided, may be furnished by a stranger, and the value made a first charge on the assets."

Other cases in which the Supreme Court of Alabama has allowed the cost of a tombstone suitable to the estate and condition of the decedent, are **Bendall's Distributees v. Bendall's Administrators**, 24 Ala. 295, 302; **Pierce v. Fulmer**, 165 Ala. 344, 348, 51 So. 728; **Phillips v. First National Bank**, 208 Ala. 589, 94 So. 801; **Garrett v. Snowden**, 226 Ala. 30, 145 So. 493; **Wright v. Meneff**, 226 Ala. 55, 145 So. 315.

You are therefore advised, under the specific authority of the foregoing decisions, that the term "burial expenses" includes expenditures for tombstones where such expenditures are reasonable in amount, taking into consideration the value of the estate left by the decedent, his solvency or insolvency, and his station in life. See extensive annotation in 121 A. L. R. 1103-1118.

I have found no Alabama authorities which have concerned themselves with the question of whether the cost of a suitable burial lot in which to inter the decedent should be allowed as a part of "burial expenses" or "funeral expenses." I am of the opinion, however, since the word "burial", as commonly understood, and as defined by both the Courts and the lexicographers, means the act of burying a deceased person, including the act of depositing the dead body in the earth, in a tomb or vault, that also included therein is the necessity for a parcel of earth, a lot, in which the deceased may be buried. Certainly, if the tombstone above the lot is a proper item of "burial expenses", then the lot upon which it rests would also be such a proper item, for it would be absurd to conclude that a tombstone could be purchased without

there being a place existing for the erection of such a stone. This conclusion is in accord with decisions in other jurisdictions. See 24 C. J. 93, Section 523; 24 C. J. 309, Section 930; 21 Am. Jur. 571, Section 335, Note 18.

You are, therefore, advised that it is my opinion that the reasonable cost of a suitable burial lot, taking into consideration the value of the estate left by the decedent, his solvency or insolvency, and his station in life, may be paid as a part of the "burial expenses."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 18, 1941.

Hon. P. C. Black,
Judge of Probate,
Geneva County,
Geneva, Alabama.

Counties—Public Buildings—Lease—sale Contracts—

Geneva County held authorized to enter into lease-sale contract for the acquisition of a building, across the street from the courthouse, to be used as an annex to the courthouse for office space for county officials and federal agencies, the courthouse not being commodious enough to meet the needs of Geneva County for office space, provided such contract does not bind Geneva County to purchase the building and the contract may be terminated without further liability to Geneva County, at the end of any fiscal year.

Opinion by Assistant Attorney General Garrett

Dear Sir:

I have your letter of July 15, 1941, in which you request my opinion as follows:

"The Court of County Commissioners of Geneva County must enlarge the Court House so as to create office space or purchase an annex for that purpose. The Court House could not be extended, due to the fact that it would occupy a portion of the street. The proposed annex is just across Town Street from the Court House and could be well used for office space.

"The County would purchase this under a lease-sale contract which, as I understand, would not affect the question arising from excessive indebtedness. You are, no doubt, familiar with the provisions of such contract. It would run for a period of four years and at the end thereof

final payment would be made and deed executed. This annex would be used principally for the location of County Officials and then for the location of Federal Agencies.

"We would like to be advised by you whether or not the Court of County Commissioners would have the authority to enter into such lease-sale contract for the final purchase of such property as an annex to the Court House? As stated, under this contract no question of exceeding the debt limit would arise."

Title 12, Section 185 of the Code of Alabama, 1940, provides in pertinent part:

"The courts of county commissioners and boards of revenue of the respective counties shall erect courthouses, jails and hospitals, and other necessary county buildings; * * *"

This proviso appeared in identical language in Section 212 of the Code of Alabama, 1923.

In 21 Corpus Juris, 819, we find the following statement:

"The authority to erect may carry with it certain incidental or implied powers in connection with the erection, such as the power * * * to purchase, * * *"

This office in an opinion rendered to Hon. W. M. Vaughan, Probate Judge, Dallas County, Selma, Alabama, under date of October 7, 1936, Quarterly Report of Attorney General, Vol. V, pages 26, held that the authority contained in Section 212, supra, and other related sections, was sufficient to invest Dallas County with the power to purchase a jail.

In an opinion to Hon. J. S. VanValkenburg, Chairman, Board of Commissioners, Madison County, Huntsville, Alabama, under date of May 14, 1937, Quarterly Report of Attorney General, Vol. VII, page 137, it was held that Section 212, supra, and other related sections, contained authority for the county governing body of Madison County to purchase land upon which to erect public buildings. One of the cases cited in support of the holding there reached was the case of *Territory ex rel Overbaker et al v. Baxter*, 83 P. 709, which is one of the cases cited in the annotation in support of the above quoted statement from Corpus Juris.

The premises considered, it is my opinion that the above quoted provision of Section 185, supra, is sufficient authority for Geneva County to purchase a building across the street from the courthouse to be used as an annex to the courthouse, the present courthouse not being commodious enough to supply the needs of Geneva County for office space. See *Jackson v. Ball*, 211 Ala. 273, 100 So. 327, and *Corning v. Patton*, 236 Ala. 354, 182 So. 39, wherein the Supreme Court of Alabama held that the broad general power control over the property of the county vested in the county governing body, includes the right to lease the property of the county, when, in the judgment of the county governing body, the same is to be best interest of the county.

Such a building may be used to supply office space to federal agencies. See opinion to Hon. John S. Golson, Judge of Probate, Butler County, Greenville, Alabama, under date of November 15, 1937, Quarterly Report of Attorney General, Vol. IX, page 93, holding that a county has the authority to pay office rent for the Resettlement Administration; opinion to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of November 9, 1933, Quarterly Report of Attorney General, Vol. X, page 132, holding that a county has the authority to pay the salary of an assistant for the Farm Security Administration Program in the county; opinion to Hon. John T. Frazer, Judge of Probate, Lee County, Opelika, Alabama, under date of April 28, 1939, Quarterly Report of Attorney General, Vol. XV, page 74, holding that a county has the authority to pay rent for property on which a Civilian Conservation Corps Camp is located in the county; opinion to Hon. W. M. Vaughan, Probate Judge, Dallas County, Selma, Alabama, under date of November 14, 1939, Quarterly Report of Attorney General, Vol. XVII, page 247, holding that a county has the authority to appropriate funds to compensate an employee of the Agricultural Adjustment Administration for additional and independent services performed for the county in the administration of the Agricultural Conservation Program for said county; opinion to Hon. D. Hardy Riddle, Judge of Probate, Talladega County, Talladega, Alabama, under date of November 29, 1939, Quarterly Report of Attorney General, Vol. XVII, page 325, holding that a county has the authority to defray the expenses of maintaining a WPA office in the county; opinion to Hon. Grady R. Williams, Judge of Probate, Lauderdale County, Florence, Alabama, under date of December 22, 1939, Quarterly Report of Attorney General, Vol. XVII, page 399, holding that a county has the authority to pay part of the administrative expenses of the offices of the Disaster Loan Corporation and the Farm Security Administration operating in the county; opinion to Hon. J. H. Sims, Judge of Probate, Bullock County, Union Springs, Alabama, under date of January 8, 1940, Quarterly Report of Attorney General, Vol. XVIII, page 19, holding that a county is authorized to furnish office equipment for the administration of its duties to the Emergency Crop Relief Program of the Federal Government; opinion to Hon. C. E. Carmichael, Judge of Probate, Colbert County, Tusculumbia, Alabama, under date of March 20, 1940, Quarterly Report of Attorney General, Vol. XVIII, page 344, holding that a county may furnish the office of the Farm Security Administration located in the county with a telephone; and opinion to Hon. J. M. Moore, Judge of Probate, Fayette County, Fayette, Alabama, under date of May 13, 1941 (copy of which enclosed for your information), holding that the county is authorized to appropriate funds to a project sponsored by the National Youth Administration, whereby a building will be constructed for the purpose of conducting a resident Youth Training Center or Vocational School to instruct the youth of the county in such subjects as woodcraft, sheet metal work and the use of welding apparatus, etc., and which will be incidentally used for other county purposes.

Since Geneva County has the right to purchase such a building to be used for such purposes, the only question remaining is whether or not there are constitutional or statutory provisions which will prevent the purchase of the same under a lease-sale contract. If there are such provisions, they are Section 224 of the Constitution of Alabama of 1901 placing a limitation on county indebtedness, and the provisions of Chapter 6 of Title 12 (Sections 73-91) of the Code of Alabama, 1940, which provide for the financial control of counties and limit their power and authority to incur obligations and to approve and pay claims for current operating expenses in any fiscal year to

the income of such year available for such purpose. However, if the lease-sale contract under which this building is to be acquired contains a proviso to the effect that Geneva County is not bound to purchase the building, but may quit the premises at the end of any fiscal year, without further obligation, and shall be under no legal obligation to make any payments except for the current fiscal year it occupies the building, then, in my opinion, such a lease-sale contract will not run counter to the provisions of Section 224, supra, even if Geneva County may have reached its constitutional debt limit, or the provisions of Chapter 6 of Title 12, supra. See opinion to Judge Vaughan first hereinabove cited, which held that Dallas County might enter into such a contract for the purchase of a jail without creating a debt within the meaning of Section 224, supra; opinion to Hon. J. A. Keller, Superintendent of Education, Montgomery, Alabama, under date of July 26, 1937, Quarterly Report of Attorney General, Vol. VIII, page 23, holding that boards of education may make such contracts for the purchase of bus bodies and chassis, provided the board of education is not legally bound to continue payments beyond the current year, notwithstanding statutory provisions requiring county and city school systems to live within their budgets; and opinion to Hon. William E. Pearsons, Director, Department of Corrections and Institutions, Capitol, under date of January 11, 1940, Quarterly Report of Attorney General, Vol. XVIII, page 37, holding that the Department of Corrections and Institutions could enter into what is commonly referred to as a lease-sale contract for the acquisition of lands, provided such contract would not bind the State of Alabama to purchase the land and the contract might be terminated, without liability to the State of Alabama, at any time, without creating a debt prohibited by Section 213 of the Constitution of Alabama, 1901, as amended.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
The Capitol.

Licenses—Tractor, Road Machinery and Trailer Dealers—

1. Section 605 of Title 51, as it appears in the Code, 1940, and without additions or interpolations, is constitutional.

2. Dealers located in cities from 25,000 to 50,000 inhabitants need not obtain a license to engage in the business licensed by Section 605, and

3. Those dealers already having a license on May 31, 1941, cannot secure a refund of the "unused" portion of such license.

Dear Sir:

Your request for official opinion bearing date of June 30, 1941, is as follows:

"It has come to our attention that through the compilation of the new Code the schedule which appears as Section 605, Title 51, dealing with the license of those engaged in the business of dealing in tractors, road machinery, or trailers, has been changed from the wording used in the original Act levying this license, in that the classification for cities or towns of 25,000 inhabitants and less than 50,000 inhabitants has been omitted. Will you please give us your opinion as to what license should apply to the dealers located in the towns coming within the omitted classification.

"In making this inquiry we call attention to an opinion rendered by the Attorney General on August 21, 1937 to the Hon. Eugene Henry, License Commissioner of Jefferson County, which opinion is published on page 343 of the Biennial Report for 1936-38."

It is my opinion that dealers located in towns coming within the omitted classification cannot be required to pay a license for the business of dealing in tractors, road machinery or trailers.

Title 51, Section 605, Code, 1940, is as follows:

"§605. **Tractors, road machinery and trailers.**—Each person other than a licensee under section 462 of this title for engaging in the business of dealing in tractors, road machinery or trailers, shall pay the following license: In cities and towns of fifty thousand inhabitants or over, state license of fifty dollars, county license of forty dollars. In cities and towns of five thousand and less than twenty-five thousand, state license of twenty dollars, county license of twenty dollars. In all other places of less than five thousand inhabitants, wheather incorporated or not, state license of ten dollars, county license of ten dollars."

Since there is here involved the construction of a provision of a code, it must be first observed that it may now be accepted as settled law that a code is not a mere compilation of laws previously existing, but is "a body of laws duly enacted, so that laws which previously existed ceased to be law when omitted from said code, and additions which appear therein become the law from the approval of the act adopting the code." *State v. Towery*, 143 Ala. 48, 39 So. 309; *Bush v. Greer*, 235 Ala. 56, 177 So. 341.

Equally well established is it that new matter "embodied in the code is, by the act adopting the code, enacted into law." *State v. Towery*, supra; *Bush v. Greer*, supra.

The appellate court decisions are, therefore, clear and emphatic in support of the conclusion that the adoption of the code "as revised, amended, corrected and reported" (Act No. 628, H. 917, approved July 2, 1940, General

Acts, 1940, page 995), carried with it Section 605 of Title 51 as a duly enacted law from the day the code became operative.

Taking the language of Title 51, Section 605, as so enacted, and as it thus comes to us from the hands of the law-making body, its import is clear and explicit. It must be plain to every intelligent reader that the Legislature has not imposed a license on dealers in tractors, road machinery and trailers, where such dealers are located in towns of 25,000 and less than 50,000 inhabitants.

There is no "ambiguity" or "doubt" as to the natural meaning of the words used in Section 605. "Ambiguity" or "doubt" exists only where the language will bear several constructions—where it is "open to several interpretations." See **Words and Phrases**, (Perm. ed.) "Ambiguity", "Doubt". Cf. **Ex parte Pittsburgh Life & Trust Co.**, 189 Ala. 413, 66 So. 489.

But, it may be argued, a distinct category has been omitted from the statute—dealers located in cities from 25,000 to 50,000 inhabitants are not mentioned—and is that not sufficient in itself to raise a doubt? Is not the Legislature presumed to have intended that dealers located in all classes of cities from above 50,000 population to those having less than 5,000 population pay some license? Can not this omission be held an inadvertent mistake on the part of the agencies charged with the preparation of the code and reference be had to the source of Section 605, the statute from which it emanated, to supply this omission?

These questions, while presenting difficult problems of statutory construction, seem definitely answered by the authorities.

Since there is here involved a taxation statute, it can be presumed that the legislature placed therein and omitted therefrom the subjects intended to be taxed or omitted from taxation. **Volunteer State Life Insurance Co. v. Larson**, 2 So. (2d), 386, 387, (Fla), Cf. **State v. New Florence Operating Co.**, 19 Ala. App. 194, 95 So. 913;

As observed in 1 Cooley on Taxation (3rd Ed) 464:

"It is fairly and justly presumable that the Legislature which was unrestrained in its authority over the subject has so shaped its law as, without ambiguity or doubt, to bring within it everything that was meant should be embraced."

The same rule, with a slight change in phraseology, is adopted in 25 R. C. L. 1092.

It therefore appears that any construction of Section 605, supra, must be controlled by the intent of the Legislature as gathered from the language which it has employed. It cannot be assumed that the draftsmen, in their attempt to repeat the original statute, accidentally dropped a portion of it. **Sever v. Ephrata Borough**, 176 Pa. St. Rep. 80, 87,

The history of the legislation cannot be of much assistance when contradicting plain provisions of the statute. Those authorities permitting a reference to the original act to give effect to the intent of the Legislature in case ambiguity is created in the codification of such statute are limited to those instances where doubt or ambiguity actually exists. *State v. Gullatt*, 218 Ala. 371, 118 So. 746. Reference may be had to antecedent legislation only to solve doubt, not to create it. 59 C. J. 1099, n. 56; Lewis Sutherland Statutory Construction (2nd. ed.), Section 450; Endlich on Int. of Stat., Sections 29, 51, 72.

Probably the ablest statement of the rule in this regard is that contained in the oft-cited case of *Hamilton v. Rathbone*, 175 U. S. 414, 419-421, as follows:

"The general rule is perfectly well settled that where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it to determine its proper construction. But where the act is clear upon its face, and when standing alone is fairly susceptible of but one construction, that construction must be given to it. * * * Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to to solve, but not to create, an ambiguity. If section 728 were an original act there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw upon its proper interpretation. * * * The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of the volume without the necessity of referring to prior statutes on the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior statutes at large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject."

Pertinent here, too, are the comments of Justice Spear, of the Supreme Court of Ohio, in *Slingluff v. Weaver*, 66 Ohio St. 621, 626:

"Undoubtedly the law is that the object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it, and that where the provisions of a given act are ambiguous, and its meaning doubtful, the history of legislation on the subject and the consequences of following a literal interpretation of the language may, and ought to be considered. Words may be transposed, or those necessary to a clear understanding and manifestly intended, as shown by the context, inserted. In the same way, and for a like purpose, punctuation may be changed or disregarded. This is allowable where doubt appears on the face of the act. But it is equally the law, we suppose, that the court does not possess, and should not attempt

to exercise, the power of introducing doubt or ambiguity not apparent in the language, and then resort to verbal modifications to remove such doubt and conform the act to the court's supposition with respect to the intent of the legislature, for it seems well settled, as expressed by Story, J., in *Gardner v. Collins*, 2 Pet. 58: 'What the legislative intent was can be derived only from the words they have used; we cannot speculate beyond the reasonable import of those words. The spirit of the act must be extracted from the words of the act, and not from conjectures *aliunde*.' The principle is expressed in different form by Allen, J., in *McClusky v. Cromwell*, 11 N. Y. 593: 'It is beyond question the duty of courts in construing statutes to give effect to the intent of the lawmaking power and seek for that intent in every legitimate way. But in the construction, both statutes and contracts, the intent of the framers and parties is to be sought first of all in the words and language employed, and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. **It is not allowable to interpret what has no need of interpretation, and when the words have a definite meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning.** Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts cannot correct supposed errors, omissions or defects in legislation, or vary by construction the contracts of parties. The office of interpretation is to bring sense out of the words used and not bring a sense into them.' (Emphasis supplied)

So, it seems that here the parts of the former act (Act No. 156, S. 75, approved March 2, 1937, General Acts, 1936-37, page 178), omitted in the revision cannot be supplied under the guide from the revision must be considered annulled, and cannot be reviewed by construction. The omitted part cannot be read into Section 605, *supra*, so to enlarge its operation, and this, although it seems likely that the omissions were unintentional. See *State ex rel. Everding v. Simon*, 20 Ore. 365, 370, citing Endlich on Int. of Stat., Sections 202, 384, and *Woodbury v. Berry*, 18 Ohio State 456. Also, see Lewis' Sutherland, *supra*, Sections 367, 388, 411, for an elaboration of these principles.

Since the words omitted in the revision cannot be supplied or incorporated into it by construction, I am ineluctably impelled to the conclusion that dealers in those cities not classified may operate without licenses. (Of course, a dealer who had obtained the proper license prior to May 31, 1941, the effective date of the act, would not be entitled to refund of the "unused" portion. Section 605 carries no implication of such consequences. Cf. Biennial Report of Attorney General, 1930-32, page 958; Biennial Report of Attorney General 1928-30, page 78; 37 C. J. 238, Section 91, n. 28.)

In reaching this conclusion I have not failed to consider the constitutionality of Section 605, when so interpreted. I am not unmindful of the rule which, by its terms, inhibits a construction of an ambiguous statute calculated to render it unconstitutional, and which requires, rather, that the statute be construed so that, with such construction, it will offend no constitutional provision. *Henry v. McCormack Bros. Motor Co.*, 232 Ala. 196, 167 So. 256.

But it is to be remembered that only where the language of the act will bear two constructions is the interpreter justified in adopting a construction that will sustain the act, rather than one which will defeat it. 25 R. C. L. 1002, Section 244, n. 1. Where the language used in the statute is plain, the expositor cannot read words into it that are not found therein, either expressly or by fair implication, even to save its constitutionality, because this would be legislation, and not construction. 25 R. C. L. 1002, Section 244, n. 2.

Already established by the above conclusions is the proposition that Section 605 is plain and unequivocal—that its terms admit of no doubt or ambiguity. Of consequence, the rule of construction restated in the McCormack Bros. Motor Co. case, *supra*, cannot be applied to alter the construction I have placed on Section 605.

It is not to be presumed from the foregoing remarks that it is my opinion that the statute, interpreted as it is by this opinion, is unconstitutional. On the contrary, it is my opinion that, even as so construed, support for its constitutionality is to be found in the opinion of Mr. Justice Foster, in *Henry v. Shevinsky*, 239 Ala. 293, 195 So. 222. In that case, also, a category of cities was omitted from a license schedule imposing a license graduated according to the designated population of the several cities of the state there included. The Court pointed out that this omission did not invalidate the statute, holding that it was the province of the Legislature to find conditions subject to legislation, and, when it says conditions are such that in cities of certain population a license schedule should be much smaller than in others, the courts are slow to set aside that conclusion as being arbitrary. It is true that in the instant case no sum is fixed for dealers not included in the schedule, whereas, in the *Shevinsky* case the court was able to conclude that the catch-all provision of the statute imposing a \$3.00 license could be applicable to the omitted category. However, the amount in that case was so disproportionate to the amount fixed by the Legislature for licenses in cities of an almost equal population as to preclude the inference that the existence of some amount *vel non* was the pivotal point of the opinion in the *Shevinsky* case is to be found in the following language of the court:

“There is no ‘imperative requirement of the Constitution that taxes, other than taxes upon property, shall be uniform or equal,’ provided they apply uniformly and equally on all ‘doing business in the designated locality.’

* * * * *

“It is of course well understood, and not controverted, that the State may make classes for license taxing purposes dependent upon the population of cities or counties, and fix a different amount of license for businesses in each such class.

* * * * *

“And the amount in each class may be further classed dependent upon some fixed standard so as not thereby to be unequal among those in each.

"The license schedule fixed in the Revenue Act of 1935 (schedule 117) makes every dealer in each city pay the same amount. Under it one who deals in those articles in Birmingham cannot conduct such a business in any other city in the State unless he also pays a license charge in the other city according to this schedule. * * * All the dealers in each locality are subject to the same amount of license charge.

"We are not willing to apply the principle of inequality when all dealers of a commodity in Birmingham, where appellee operates, are subject to the same amount of license charge, when a different license charge is fixed in cities of lesser population, merely because, possibly by inadvertence, four cities of the State of greatly less population, are omitted from the schedule; * * *."

Since it seems that the court has held in the Shevinsky case, supra, that a classification which places all doing business in the same locality in a single category is not necessarily unreasonable, I am of the opinion that, under this authority, Section 605 is constitutional. Moreover, such a classification, it has been held, must be presumed to be reasonable, in the absence of any indication to the contrary. 33 Am. Jur., Licenses, Section 33, n. 9.

There is nothing in the terms of Section 605, or in the Code of 1940, to reflect upon the propriety of such a classification. As indicated in the Shevinsky case, it is in fact based upon an accepted theory of classification for license purposes.

You are, therefore, advised:

1. That Section 605 of Title 51, as it appears in the Code, and without additions or interpolations, is constitutional;
2. That dealers located in cities from 25,000 to 50,000 inhabitants need not obtain a license to engage in the business licensed by Section 605, and,
3. That those dealers already having a license on May 31, 1941, cannot secure a refund of the "unused" portion of such license.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 19, 1941.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Motor Vehicles—Licenses—Ad Valorem Taxes—

1. Personal property can, for the purpose of taxation, acquire a situs of its own.

2. Personal property, such as a motor vehicle, can acquire, for the purpose of taxation, a situs in a county separate and apart from the residence of its owner, even though the owner resides in the same county.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your letter of February 25, 1941, in which you request my official opinion, is as follows:

"Please advise me in answer to the following question:

"Mr. A resides in the city of Montgomery and gives the city of Montgomery as his official residence when assessing his home for ad valorem taxes. Mr. A. owns a sawmill out in the county beyond the police jurisdiction. Mr. A gives the city of Montgomery as his residence when he buys a tag for his passenger car. He gives the location of his sawmill as his address when he buys the tags for his trucks and trailers.

"The question is, should Mr. A give the city of Montgomery as the proper residence or legal address when he buys the tags for the trucks and trailers?

Mr. A individually owns the trucks and trailers."

In answering your inquiry, I first call attention to the 1940 Code, Title 51, §704(a), which is as follows:

"(a) To prevent motor vehicles within the meaning of this article from escaping taxation and to provide for the more efficient assessment and collection of taxes due on same, no license shall be issued to operate a motor vehicle on the public highways of this state, nor shall any transfer be made by the probate judge as provided under this article, **until the ad valorem tax on such vehicle shall have been paid in the county for the preceding year, as evidenced by a receipt of the tax collector where the owner of said vehicle resides, if the vehicle is owned by an individual, and if the vehicle is owned by a firm, corporation or association, then as evidenced by the receipt of the tax collector in the county in which said motor vehicle is used or operated.** Every person, firm or corporation, who desires to operate a motor vehicle on the public highways of Alabama

shall first return such motor vehicle for ad valorem taxation to the tax assessor of the county in which he resides, for the preceding tax year, and the tax assessor of such county shall deliver to such person who makes the return as herein required, a certificate of assessment on a form prescribed by the department of revenue, and such certificate shall be the warrant of the tax collector to collect the tax as shown thereon." (Emphasis supplied)

It will be noted that in the event a motor vehicle is owned by an individual a license will not be issued to operate the same upon the public highways until the ad valorem tax on such vehicle shall have been paid in the county, for the preceding year, in which the said individual resides.

In view of the foregoing, your inquiry presents the question as to whether or not personal property, such as a motor vehicle, can acquire within a county in which the owner thereof resides, for the purpose of taxation, a situs separate and apart from the residence of the owner.

I have been unable to find any authority directly upon the point presented by the above question. My study and research does reveal, however, that our Supreme Court has laid down several rules which are of aid in determining the answer to the above question.

In the case of *Tennessee Coal, Iron & R. Co. v. State*, 239 Ala. 19, 193 So. 143, it was pointed out that the Court, in the case of *Trammell v. Conner*, 91 Ala. 398, 8 So. 495, declared "that personal property may acquire such a situs in the county in which it is kept and used as to become liable to taxation thereof, although the owner resides in another county and has there returned it for taxation. The illustration used was that of a portable saw mill and a yoke of oxen used in connection with such manufacturing machinery. Mr. Justice Clopton for the Court observed: 'In order, however, to render the property liable to taxation, its situs must be permanent in its nature, though not so permanent as real estate. It must have no actual location elsewhere. Property in transitu, or temporarily in the county, is not subject to assessment merely because it happens to be in the county on the day the assessment commences. * * *'"

Further, in the case of *Trammell v. Conner*, supra, the Court said:

"As regards the place at which tangible personal property is assessable for taxes, the courts have generally discarded the legal fiction that such property follows the domicile of the owner, and hold that it may have an actual situs independent of the owner's residence, constituting the condition which subjects it to taxation. * * In order, however, to render the property liable to taxation, its situs must be permanent in its nature, though not so permanent as real estate; it must have no actual location elsewhere. * * "

In the case of *Boyd v. Selma*, 96 Ala. 144, 11 So. 393, it was said:

"The situs of personal property, whether tangible or intangible, for the purposes of taxation, unless otherwise provided by statute, is at the

place of residence of the owner, the only exception being where the property is employed in business, or is in the hands of an agent of the owner having an actual situs different from the domicile of the owner."

In the case of **Tennessee Coal, Iron & R. Co. v. State**, *supra*, "the question before the Court is the power of the Tax Assessor for the County of Jefferson to make an escape assessment after the end of the tax year 1934 to 1938 for the City of Birmingham and for the Birmingham School District on personal property previously returned and assessed for taxation, and upon which assessment the yearly taxes have been paid in the Bessemer Division of said County." The said personal property in question was owned by a corporation (Tennessee Coal & R. Co.), which had its principle office in this State, in the City of Birmingham, Alabama, and the said personal property in question consisted of watercrafts which operated between the Birmingham port, in the Bessemer division of Jefferson County, to Mobile and other given ports. The Court took judicial knowledge of the fact that "at no time has any of said watercrafts entered or operated in the physical limits of the City of Birmingham."

After reviewing the authorities hereinabove set out, together with many others, the Court concluded that the said watercrafts were properly returned for taxation at the Bessemer division of Jefferson County, "where its only and essential navigating points, docks and wharfs are located." In other words, for the purpose of taxation, the watercrafts in question had acquired a situs of their own in the Bessemer division of Jefferson County, Alabama, and were not subject to be returned for taxation in the Birmingham division of said County. See, also, **Pure Oil Company v. State**, (Sup. Ct.), 1 So. 2d. 648.

From a review of the foregoing authorities, it will be seen that personal property can, for the purpose of taxation, acquire a situs of its own. While it is true that our courts have never spoken directly to the point that personal property can acquire, for the purpose of taxation, a situs within a county different from the residence of its owner, yet it is my opinion, based upon the authorities heretofore cited, that our Supreme Court would so hold if it was ever presented with this question. It must be remembered that the case of **Tennessee Coal, Iron & R. Co. v. State**, *supra*, is not express authority for my conclusion, as in this case the personal property was owned by a corporation. The extent to which the Court did go in this case, however, lends great weight to the correctness of my conclusion.

The foregoing conclusion is applicable to the particular situation outlined in your letter, but I am unable to apply the same, inasmuch as you have not supplied sufficient facts. The duty to apply the conclusion herein reached to the full facts surrounding the particular situation referred to your letter is cast upon the assessing authority of Montgomery County. **Tennessee Coal, Iron & R. Co. v. State**, *supra*.

As to whether Mr. "A", referred to in your letter, should give the City of Montgomery as his proper residence or legal address when purchasing tags for trucks and trailers, is, in my opinion, immaterial. The only duty imposed by the statute upon the owner is that the property be assessed and the ad valorem taxes paid in the county of his residence. It then becomes the duty

of the assessing authority of Montgomery County to determine whether or not the particular trucks and trailers in question have acquired a situs, for the purpose of taxation, within Montgomery County, but outside the corporate limits of the City of Montgomery, in which the owner thereof resides.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 19, 1941.

Hon. J. H. Dobbins, Register,
Circuit Court in Equity,
Calhoun County,
Anniston, Alabama.

Register—Fiduciary Funds—

Register entitled to fees provided for by Title 11, Section 27 of the Alabama Code of 1940 for receiving, keeping and paying out or distributing fiduciary funds.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of July 1, 1941, is as follows:

"Please refer to that part of Title 11, Section 27, Code of Alabama, 1940, which reads as follows:

"For receiving, keeping and paying out or distributing money, other than arising from sales, on the first one thousand dollars, one per cent; all over one thousand and not over five thousand dollars, three fourth of one per cent; all over five thousand dollars, not exceeding ten thousand dollars, one half of one per cent; and all over ten thousand dollars, one fourth of one percent'

"and advise me if, under this section I am entitled to retain the above scale of commission on funds coming into my hands, kept by me, and subsequently paid out, these funds being received, kept and disbursed under Title 58, Section 31, 1940 Code, this section covering fiduciary funds, separate from funds from sales of lands for distribution.

"It appears that this question has been answered affirmatively in your opinion of January 13, 1936, Biennial Report 1934-36, page 459, and if this opinion applies to the above question your advice accordingly will be appreciated."

It is my opinion that your inquiry should be answered in the affirmative. Fiduciary funds are defined by Title 58, Section 31, of the Code of Alabama, 1940, as follows:

"§31. **Fiduciary funds defined**—Fiduciary funds as used in this chapter shall include any sums whatsoever which have come into the hands of such officer and of which he is not the absolute and unqualified owner, including witness fees and other fees or funds to which any person is entitled, other than himself."

The pertinent part of Title 11, Section 27, is as follows:

"§27. **Fees allowed to register**.—Registers are entitled to the following fees for the following services:

* * * * *

"Commission on sales: For the first one hundred dollars, two percent; for all over one hundred dollars, and not exceeding one thousand dollars, one and one-half percent; for all over one thousand dollars and not exceeding twenty thousand dollars, one percent; and for all over twenty thousand dollars, one-fourth of one percent. For receiving, keeping, and paying out or distributing money, other than that arising from sales, on the first one thousand dollars, one percent; on all over one thousand dollars and not over five thousand dollars, three-fourths of one percent; on all over five thousand dollars, not exceeding ten thousand dollars one-half of one percent; and all over ten thousand dollars, one-fourth of one percent; receiving, keeping and paying out money paid into court under a decree in favor of an administrator ad litem, one-half of one percent on the amount so received and paid out; for each notice sent by mail to creditors under articles 1 and 2 of chapter 1 of title 38—\$.15".

Clearly, if funds of this nature do not arise from a sale or from a decree in favor of an administrator ad litem, which contingencies are specifically provided for, then they come within the provision of Title 11, Section 27, "money, other than arising from sales," and the register would be entitled to the commission therein provided for receiving, keeping and paying out or distributing such money.

As mentioned in your inquiry, a similar situation was dealt with in an opinion of this office to Hon. George L. Sherrill, Register in Chancery, Limestone County, on January 13, 1936, (Biennial Report of Attorney General, 1934-36, page 459), wherein a bill was filed in court to approve a contract of sale made between parties including a minor. Upon approval of the sale by the court, the money was paid into court for distribution. In that situation, it was determined that the register was not entitled to a commission for making the sale, as he had nothing to do with the sale, but that he was entitled to the commission provided for by Title 11, Section 27, supra, for receiving, keeping, and paying out of distributing money, other than that arising from sales."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 19, 1941.

Hon. Rascoe Maddox,
Superintendent of Education,
Chilton County
Clanton, Alabama.

Chilton County Superintendent of Education—Expenses—

The limitation of \$600 per annum placed by the general law upon expenses of county superintendents of education is inapplicable to the superintendent of education of Chilton County, Alabama.

Local Acts, 1935, page 164; Code 1940, Title 52, Section III.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of July 18, 1941, is as follows:

"Senate Bill 229-Thomas, approved August 27, 1935 provides that the Board of Education of Chilton County, Alabama, may pay the Superintendent of Education of Chilton County any expenses incurred by him in the discharge of his duties as Superintendent of Education of Chilton County.

"I should like to ask if the maximum of such payments is limited to \$600.00 per annum as set forth in Section 111, Titles 52, Code of 1940."

It is my opinion that your inquiry is specifically answered in the negative by the express language of Code 1940, Title 52, Section 111. The pertinent part of this section is as follows:

"The provision of the last four paragraphs of this section shall not apply to superintendents of education whose salaries amount to three thousand dollars per annum or more nor to any superintendents of education who receive expenses under local acts heretofore passed by the legislature of Alabama." (Emphasis supplied)

The reference in the foregoing quotation to "the last four paragraphs of this section" evidently refers to the entire section, since, as codified, it contains four paragraphs only.

Since Act No. 273, S. 229, approved August 27, 1935, (Local Acts, 1935, page 164), providing for the payment of certain expenses of the superintendent of education of Chilton County, Alabama, was passed by the legislature prior to the adoption of the Code of 1940, it is at once apparent that the superintendent of education of Chilton County receives expenses under a local act "heretofore passed by the legislature of Alabama," and therefore comes within the purview of the exception above quoted from Section 111.

Accordingly, the limitation of \$600 per annum contained in Section 111 is not applicable to the county superintendent of education of Chilton County.

Cf. Quarterly Report of Attorney General, Vol. XVIII, page 175;

Quarterly Report of Attorney General, Vol. XIX, page 72;

Quarterly Report of Attorney General, Vol. XX, page 359.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 21, 1941.

Hon. G. C. Blanton,
Judge of Probate,
Dallas County,
Selma, Alabama.

Filing Tax—Chattel Mortgage—Deed Filing Tax—

Chattel mortgage is subject only to mortgage filing tax and is not subject also to payment of a deed filing tax. Code 1940, Tit. 51, §§618, 619.

Form of instrument examined and held to be a chattel mortgage only.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated June 28, 1941 follows:

"We will appreciate it very much if you will give us your official opinion as to whether the enclosed form of chattel mortgage is subject to a deed tax or not."

I have examined the enclosed printed document, purporting to be a form of chattel mortgage, above referred to, reading in part as follows:

"THIS INDENTURE, WITNESSETH, That whereas _____
Mortgagor
of _____ in _____ County, Alabama, is indebted to _____
in the sum of _____ Dollars (\$ _____) evidenced by a
Mortgagee

by a promissory note of even date herewith executed by Mortgagor and payable to Mortgagee in installments shown on said note.

"NOW, THEREFORE, to secure the payment of said indebtedness, Mortgagor does hereby sell and convey to "Mortgagee the following described Motor Vehicle to-wit:

New or Used	Year	Trade Name	Type of Body (if truck—enter TR also tons	Serial No.	Motor No.

and all equipment added by the Mortgagor."

(Followed by covenants and power of sale)

Said form is in my opinion a chattel mortgage form, nothing more, nothing less. Evidently, when executed and completed it will secure a debt by mortgage on a motor vehicle to be definitely described so as to admit of identification. It contains covenants designed to preserve as far as practicable the integrity of the security, and also provides, upon the happening of any event of default, for seizure of the vehicle, and sale thereof, proceeds of sale to be credited upon the debt secured and the expense of seizure, sale, etc.

I find nothing in this instrument that can be said to operate as a "deed, bill of sale, or other instrument of like character which conveys any real or personal property * * * or * * * any interest in any such property," otherwise than to the mortgagee. Code 1940, Tit. 51, §618. Assuredly, it conveys nothing to the mortgagor. Rather, it may be said, it conveys title out of the mortgagor.

It is in that respect to be distinguished from a conditional sale contract as to which the Supreme Court of Alabama, the Court of Appeals, and this office, have held that both the deed filing tax and the mortgage filing tax are payable, upon the theory that a conditional sales contract or retention of title contract as it is sometimes called, conveys to the conditional vendee some sort of interest in personal property, although the vendor retains legal title to the subject matter of conditional sale in order to secure the balance of unpaid purchase money.

Thompson v. Smith, 27 Ala. App. 460, 174 So. 796; cert. den. 234 Ala. 409, 174 So. 797;

Quarterly Report of Attorney General, Vol. XXII, page 51;

Quarterly Report of Attorney General, Vol. XIII, page 109;

Quarterly Report of Attorney General, Vol. XVII, pp. 124, 417;

Quarterly Report of Attorney General, Vol. XI, page 70;

Quarterly Report of Attorney General, Vol. X, page 188.

In an opinion dated March 26, 1938 to Hon. J. F. Laseter, Judge of Probate, Barbour County (Quarterly Report, Attorney General, Vol. X, page 188), its was said:

"In reference to the second instrument, while it appears on its face to be a simple mortgage, your notation indicates that it has come to your knowledge that it is used in the sale of new automobiles and that it is in effect also a retention of title contract. When this is ascertained, it is your duty to govern yourself by this information. *Thompson v. Smith*, 27 Ala. App. 460, 174 So. 796; *Long v. Jasper Land Co.*, 217 Ala. 593, 117 So. 210, 211."

Likewise, in an opinion dated December 29, 1937, to Hon. H. J. Brogden, Judge of Probate, Covington County (Quarterly Report of Attorney General, Vol. IX, page 171), after examination of an instrument purporting to be merely a chattel mortgage, upon a motor truck and other personal property to secure a debt, it was said:

"An examination of the instrument submitted by you reveals that on its face it is merely a mortgage. It does not appear from the face of the instrument that same is a conditional sale contract. As stated in *Thompson, Probate Judge, v. Smith*, 174 So. 796; Cert. Den. by the Supreme Court of Alabama in *Thompson v. Smith*, 174 So. 797, the Probate Judge 'may accept as prima facie correct the recitals of the deed (or mortgage, we interpolate) *** and may act accordingly, in the absence of any fact or circumstances to the contrary, coming to his attention calculated to put on notice a reasonably prudent person.'

"If as you say, however, you are persuaded that the instrument submitted to you is so drawn as to avoid the payment of a tax and to disguise the real transaction, you are within your rights in ascertaining whether or not there was in fact a sale entered into between the parties and whether or not a cash payment was made on the purchase price of the article described in the instrument offered for recordation at the time of its purchase. Having ascertained by inquiry that there was in fact a sale and there was a cash payment, it becomes your duty to govern yourself by such information in determining upon the amount of tax which is to be imposed."

Upon further consideration, I am persuaded that these last two opinions are not sound and that the decision in *Thompson v. Smith*, supra, based on consideration of a conditional sale contract only as it was, is not authority for any such doctrine as that announced in these two opinions. These two opinions and all other opinions of this office to the same effect are, therefore, overruled in that respect.

In conclusion, you are advised that no deed filing tax is due to be paid on the form of chattel mortgage you submitted for examination.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 21, 1941.

Hon. William Varner,
Judge of Probate,
Macon County,
Tuskegee, Alabama.

Filing Tax—Deeds—Mortgages—Municipal Corporations—

Deed conveying electric light plant to a municipal corporation, not subject to deed filing tax (Code 1940, Tit. 51, §618).

Instrument securing bonds of municipality by pledge of future revenues from operation of said plant examined and held not subject to mortgage filing tax (Code 1940, Tit. 51, §619).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated July 3, 1941, follows:

"The attached paper is a copy of the pledge of the Revenue from the Municipal Light Plant (Not Water Plant) to pay bonds issued by the City of Tuskegee for the purchase of the Electric Light and Power Plant, etc.

"This is the only mortgage, lien or pledge filed and was filed at the instance of the attorney representing the purchasers of the bonds, who claims it is exempt from mortgage tax under Code of 1940, Tit. 51, Sec. 619.

"The City of Tuskegee purchased this plant, franchise, etc. by purchasing the stock of the Tuskegee Light and Power Co., and transferring the stock to three Trustees or Dissolution Trustees, the Trustees conveying the property to the City by separate deed which was filed in this Office for a recited consideration of \$1.00 and other consideration; but they inform me the actual consideration was \$350,000.00. Is this deed subject to Deed tax under 51-618 of the Code of 1940 My judgment is that the Deed to the City is exempt from the tax.

"Please advise if the mortgage or pledge, copy being enclosed is exempt? Reference your opinion Quarterly Report for the period January 1, 1936 through Mar. 31, 1936, page 239. I further contend this pledge of income or revenue from the 'Light Plant' does not come within exemption Code 1940- 37-252- mortgage on property; nor does it come under exemption in 37-264 which is a pledge of revenue from tax; nor does it come under exemption 37-267 which is a mortgage on public property; nor does it come under exemption in 37-270 which provides for pledge of revenue from a waterworks plant."

The deed above referred to conveying to the City of Tuskegee the plant of Tuskegee Light and Power Company, in consideration evidently of \$350,000 City of Tuskegee bonds secured by pledge of revenues to accrue from its future operation by the city, is exempt from the so-called deed filing tax imposed by Code 1940, Tit. 51, §618. Opinion of Attorney General, March 2, 1939, to Hon. J. Lee Smith, Judge of Probate, Chilton County (Quarterly Reports, Attorney General, Vol. XIV, p. 166).

See, also, the opinion of the Attorney General of July 9, 1936, to Hon. N. P. Tompkins, Judge of Probate, Colbert County (Quarterly Reports, Vol. IV, p. 28); **Huntsville v. Madison County**, 166 Ala. 389, 52 So. 326; **State v. City of Montgomery**, 228 Ala. 93, 151 So. 856.

The instrument referred to in your letter, of which a copy was inclosed, is as follows:

"KNOW ALL MEN BY THESE PRESENTS:

"The undersigned City of Tuskegee, a municipal corporation under the laws of Alabama, hereby acknowledged that in connection with the acquisition of it by title to the electric power and distribution system located in Macon County, Alabama, owned by Tuskegee Light & Power Company, an Alabama corporation this day dissolved, at the time of the dissolution of said company, the title to which system was conveyed to said city by deed dated July 1, 1941 from said company and its trustees in dissolution, said city did simultaneously with the delivery to it of said deed issue \$375,000 principal amount of its 4% Electric System Revenue Anticipation Bonds dated July 1, 1941, authorized by resolution adopted by the city council of said city on June 13, 1941, and that under the provisions of said resolution said city did segregate and irrevocably pledge, as security for the payment of the principal of and interest on said bonds, the revenues that will be derived from said system as the same is now and may hereafter be constructed.

"In Witness whereof, said city has caused this instrument to be executed in its name and in its behalf by its mayor and its seal to be hereto affixed and attested by its city clerk this 1st day of July, 1941.

City of Tuskegee
By G. B. Edwards
Its Mayor

SEAL

Attest: J. W. Ross

Its City Clerk

"STATE OF ALABAMA)
MACON COUNTY)

"I, Louis C. Kelly, a Notary Public in and for said county in said state, hereby certify that G. B. Edwards, whose name as Mayor of the City of Tuskegee, a municipal corporation, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of the said conveyance, he ex-

ecuted the same on said date as said officer and with full authority for and as the act of said corporation.

"Given under my hand and official seal 1st day of July, 1941.

"SEAL

Louis C. Kelly

Notary Public."

The foregoing instrument in my opinion is neither a mortgage nor a deed of trust, nor an instrument of like character within the purview of Code 1940, Tit. 51, §619, imposing the mortgage filing tax.

Said instrument is in substance merely a covenant to set aside in future the earnings when, as and if earned, of the light plant, for application to payment of the bonds therein referred to. It does not operate as a transfer, assignment or conveyance of any property, personal or real, or any presently existing interest in property, personal or real, although it purports to secure a debt.

Under §619, Tit. 51, Code of 1940, supra, the instrument to be taxable must, to paraphrase the language of the statute in part, "convey real or personal property situated in this State or some interest therein." The instrument in question conveys none of these things.

It is unnecessary therefore to consider the application of §267, Tit. 37, Code of 1940 as to the exemption of a filing tax for the recording of mortgages of public property.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 21, 1941.

Hon. Frank C. Manning,
Tax Collector,
Madison County,
Huntsville, Alabama.

Bankruptcy—Frazier-Lempke Bankrupt Act—

Sale of land for taxes—Real property of person who files bankruptcy proceedings under the provisions of Title 11, §203, U. S. Code Annotated, as amended, may not be sold by the State at tax sale unless the court having jurisdiction of the bankrupt estate authorizes such sale.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of May 15, 1941 follows:

"I have two assessments that I would like to ask your opinion.

"1. This assessment is made to ten people all ten names appear on the assessment, one of the ten (Dessie Turner) has taken the Frazier-Lempke Bankrupt Law.

"2. This assessment is made to Calvin Tibbs Jr. Admr. for Calvin Tibbs Sr. Est., and the same Dessie Turner mentioned above is one of the heirs.

"I have (sic) advised by the Referee in Bankruptcy and also by Dessie Turner's legal advisor that I could not sell either of these pieces of property for taxes because of the fact that Dessie Turner is a partner in the first assessment and is one of the heirs on the second assessment.

"The first assessment is a new assessment made for the first time this year, the second assessment has been carried in litigation for the tax years 1938 and 1939. Up to the present date I have been unable to collect either, on the taxes carried in litigation or on the current year's taxes.

"I am anxious to clear my books of this old litigation and to keep this other assessment from becoming a litigation. Will you advise me as to whether I can sell either of these pieces of property for taxes if so, should I sell it as a whole or as so many undivided interest? Your prompt opinion on this matter will be appreciated."

My answer to your inquiry is in the negative.

The Frazier-Lempke Bankrupt Law referred to by you in the above request is found in Title II, §203 of United States Code Annotated, as amended. Subhead (3) of subsection (o) of Section 203 reads as follows:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

"(3) Proceedings to acquire title to land by virtue of any tax sale;"

It will be noted from the above quoted excerpt of said section that any proceeding to acquire title to land by virtue of any tax sale may not be instituted after a petition of bankruptcy has been filed under the provisions

of Section 203, unless the judge or court having jurisdiction thereof authorizes the sale of such property.

In this connection, I also call your attention to the pertinent part of subhead (4) of subsection (s) of said Section 203, which reads as follows:

"The provisions of this title shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition."

I also desire to call your attention to the pertinent provisions of subsection (n) of said Section 203, which reads as follows:

"(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding some to the clerk of court, praying for relief under this section, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition."

It will be noted from the last two hereinabove quoted subsections that the provisions of this Act apply to all real and personal property of the bankrupt, any equity or right which he may have in such property including contracts of purchase, contracts of deed, or conditional sales contracts, the right or the equity of redemption, and also applies to all partnership property common property, entirety property, joint property, or community ownership.

Therefore, since it appears from your request that Dessie Turner, the bankrupt, has an interest in the lands here considered within the purview of the last two hereinabove quoted subheads, it is my opinion that you, as Tax Collector of your county, would not be authorized to sell any of this land for taxes unless the court having jurisdiction of the bankrupt estate, by proper order or decree, specifically authorizes and directs you to sell this property.

In view of the fact that this property cannot be sold unless the court authorizes the sale thereof, I suggest that you file a petition in the bankrupt court seeking to obtain permission for you, as tax collector, to sell this property in order to collect the State and County taxes.—Cf. Quarterly Report of Attorney General, Vol. XVII, page 371.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 21, 1941

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Tax Exemptions—Alabama Income Tax—Corporations—

Corporations formed under Section 7046 of the Code of 1923 (Code of 1940, Title 10, Section 168) not exempt from payment of state income tax under Section 345.25 of Revenue Act of 1935, (Code of 1940, Title 51, Section 399).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of April 22, 1941, in which you request my official opinion as follows:

"An opinion is requested as to whether or not Palmerdale Homestead Company, Incorporated, Palmerdale, Alabama, is exempt from income tax under any of the provisions of Section 345.25 of the Alabama Income Tax Law, a part of the Revenue Act of 1935.

"The Palmerdale Homestead Company, Incorporated, was organized under the laws of Alabama, August 1, 1940, as a non-profit, low income homestead association. On April 19, 1941, pursuant to terms of an extension granted by this office in which to file return for the year 1940, due March 15, 1941, a return prepared in blank was transmitted by letter which constitutes a request for exemption from income tax. The letter is quoted as follows:

"Attached herewith is a copy of the Declaration of Incorporation of the Palmerdale Homestead Company, Inc., also a statement signed by the Secretary of this Association, which sets forth the purpose for formation of this Association and other data concerning this set-up.

"We also enclose a copy of the By-Laws of our Association and copy of the Financial Statement as of Dec. 31st, 1940.

"It is the desire of this Association in submitting to you this information that State Income Tax exemption be obtained.

"If further information is desired, we will be glad to furnish it."

"We, therefore, submit:

"(a) Copy of the Declaration of Incorporation,

"(b) Statement signed by the Secretary of the Association,

"(c) Copy of the By-Laws of the Association,

with request that you favor us with an official opinion as to the application of Section 345.25 of the Act in the premises.

"Other corporations organized on the same basis are claiming the exempt status, as it appears that such associations are being organized in connection with the Federal Housing Project."

Section 345.25 of the Revenue Act of 1935 (Code of 1940, Title 51, Section 399) enumerates with particularity ten classes of corporations or organizations exempted from payment of income tax thereby imposed.

The Palmerdale Homestead Company, Incorporated, was incorporated under Section 7046 of the Code of Alabama of 1923, (Code of 1940, Title 10, Section 168) as shown by its certificate of incorporation, of record in the office of the Judge of Probate of Jefferson County, Alabama. Examination of the said certificate or declaration of incorporation discloses it to be a corporation organized, to quote the language of the statute, "not for pecuniary profit in the sense of paying interest or dividends on stock, but for mutual benefit through the application of cooperation." Such mutual benefit accrues to its members, not from receipt of dividends or of interest, but from application of its surplus earnings to improvement of its property and provision of facilities enabling its members "to engage in gainful pursuits within such community," as set forth in the 17th section of the declaration.

Under its Articles of Incorporation and as provided by the statute (Code of 1923, Section 7046—Code of 1940, Title 10, Section 168—supra) the corporation may engage in numerous corporate activities ordinarily carried on by ordinary business corporations, such as ownership and operation of "plants, mills, factories, industries, commercial establishments *** and power, light, gas and water plants," to serve its members, as set forth in the fourth section, subd. (a) of the declaration.

I find nothing in the declaration or the statute to inhibit the earning of a profit by such operations, although such profit, if earned, must be re-invested and not distributed as dividend.

Applying the well-established rule that statutory provisions for exemption from taxation must be strictly construed and favorably to the taxing authority,—if in this case construction were necessary,—I am of the opinion that the Palmerdale Homestead Company, Incorporated, is not exempt from payment of Alabama income tax.

Construction need not, however, be resorted to in this instance. Said company does not come within any of the exemptions expressly declared in Section 345.25 of the Revenue Act of 1935, (Code of 1940, Title 51, Section 399), supra.

It might be well to point out that our Supreme Court in the case of **Fairhope Single Tax Corporation v. Melville**, 193 Ala. 289, 69 So. 466, held that the provisions of law under which the corporation in question was organized do not effect any change in the tax systems or tax provisions. Therefore, if said corporation is entitled to exemption from income tax, it must fall

within one of the classes of corporations exempted in Section 345.25 of the Revenue Act of 1935 (Code of 1940, Title 51, Section 399), supra. This proposition is discussed above.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 23, 1941.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Maps and plats dedicating streets, alleys, etc.—

1. Recording of maps and plats of land platted or mapped, dedicating as streets, alleys or public ways within the corporate limits or police jurisdiction of cities of more than ten thousand inhabitants must have approval of the city authorities or its engineer before filing for record.

2. This is true although the land platted lies within the police jurisdiction of a city of more than ten thousand and the police jurisdiction of a city of less than such population.

3. Where the corporate limits of municipalities conjoin, there is no zone of police jurisdiction along such line and a plat of lands lying within the corporate limits of one does not require the approval of the authorities of the other when sought to be filed for record.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your letter of June 27, 1941, requesting an official opinion, is as follows:

"The town of Northport and the city of Tuscaloosa, Alabama, are very close together, the Warrior River being the boundary line between the two municipalities. Each town is making a rather rapid steady growth, many subdivisions of property are being made in which streets, alleys and road ways are laid out. A question has arisen as a result of a Section in the new Code under Town Surveys, Plats, Etc. Tit. 56, Section 15, Page 523 of the Code Title 52-61 which reads as follows:

15. Approval of municipal authorities required.—It shall be the duty of every probate judge in this state to decline to receive for record in his office any map or plat upon which any lands lying

within the corporate limits or police jurisdiction of any city of this state having a population of more than ten thousand inhabitants are platted or mapped as streets, alleys or other public ways, unless such map or plat shall have noted thereon the approval of the governing body or city engineer of such a city. (1927, p. 217.)

"Is it necessary for me as Probate Judge to submit to the City Governing Body of the City of Tuscaloosa, for their approval, maps or plats within the town of Northport or within a closer radius to the town of Northport than the City of Tuscaloosa? In other words some of the property being platted and surveyed in the town of Northport is without the limits of that town yet it is not more than $\frac{1}{2}$ mile air line from the city limits of the City of Tuscaloosa.

"Your interpretation of this Code Section as it relates to property in or within the police jurisdiction of a small town which is within the police jurisdiction of a town coming under this general code section will be appreciated by me."

Your question calls for a consideration of Title 56, Section 15 of the Code of Alabama, 1940, and Title 37, Section 9 of the same code.

There is no question of conflict or overlapping of jurisdiction involved in your question. The first law above named is simply defining the bounds of territory and character of territory that requires maps and plats to have noted thereon the approval of the governing body of a city or its engineer. The territory is that lying within the corporate limits or police jurisdiction thereof of a city of ten thousand or more population. The character of the territory is an incorporated city having a population of more than ten thousand. There is no conferring of jurisdiction by this enactment but merely describing territorial boundaries within which lands are platted.

This latter law (Code of 1940, Title 37, Section 9) is only extending the police jurisdiction of municipalities and nothing more. **White v. City of Decatur**, 225 Ala. 646, 144 So. 873. The provisions of this latter law are only useful in determining the extent of adjoining land to a city of more than ten thousand inhabitants.

I am unaided by an opinion of this office or decision of our appellate courts on the exact point here presented and considered. My opinion is that if the maps and plats offered for record cover lands lying in the corporate limits of the City of Tuscaloosa or within its police jurisdiction, the maps and plats must have noted thereon the approval of the governing body of the City of Tuscaloosa or its city engineer. Otherwise, you must not receive for recordation or record the same and this is true although the lands described by the maps and plats are lying within the police jurisdiction of both cities of Tuscaloosa and Northport. I must take judicial knowledge that the City of Northport is a city or town of less than ten thousand population. No duty rests on you to submit the maps and plats in any event to the city for approval. That duty rests upon the party seeking to have the maps and plats filed for record. There is some reference in your letter to maps and plats of land lying within the corporate limits of Northport. I construe your request to be confined to lands lying within the police jurisdiction of the two cities.

If, however, you desire to know as to filing of maps and plats of land within the corporate limits of Northport, then it is my opinion that approval of such maps and plats by the governing body of the City of Tuscaloosa is not required.

It is true the language of Title 37, Section 15, Code of Alabama, 1940, requires such approval but the language used must be considered in connection with the general body of our laws and the philosophy of our form of government. To construe this language literally, it would run counter to our well-established policy of local self-government. It is inconceivable that the legislature intended to invest the governing body of a city of ten thousand inhabitants with power to approve or disapprove maps and plats dedicating streets, alleys and public parks lying within the corporate limits of another city or town. If Tuscaloosa is invested with power to approve such maps and plats, then it follows that it is necessarily clothed with power to disapprove the same. This would lead to intolerable ends.

The case of *City of Homewood v. Wofford Oil Co.*, 232 Ala. 634, 169 So. 288, while considering the police jurisdiction of the cities of Homewood and Birmingham, by way of digression, on page 636, used this language:

"We are of opinion that incorporation of Homewood, for example, cut down the limits of the police jurisdiction of Birmingham so far as the corporate limits of Homewood were within the three mile limit of the corporate limits of Birmingham."

This expression of the court is somewhat in the nature of a dictum but at the same time the announcement of a sound principle. This language of the court necessarily leads to the conclusion that where the corporate limits of two cities or town conjoin, there is and can be no zone of police jurisdiction along such lines.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 25, 1941.

Hon. Frank M. Allen,
County Superintendent of Education,
Clay County,
Ashland, Alabama.

Clay County—Superintendent of Education—Expenses—

The County Board of Education of Clay County is empowered to fix, approve and authorize the payment of traveling expenses incurred by the Superintendent of Education in the performance of his official duties within the county and the expenses incurred by him when his official duties require him to go outside the county.

Code 1940, Title 52, Section 111; Local Acts, 1935, page 192.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 22, 1941, in which you request my opinion:

"Under a local law (Local Acts of 1935, page 192) the County Board of Education fixes the salary of the Superintendent at 'not less than \$2,400.00 nor more than \$3,000.00 per annum', which salary 'shall include the expenses of said County Superintendent of Education'. Section 111 of Title 52 of the Code of Alabama of 1940 authorizes county boards of education in counties where the maximum salary of the Superintendent is fixed by law to pay the travelling expenses of such superintendent.

"Can the County Board of Education of Clay County authorize and pay the travelling expenses of the Superintendent of Education of that county when the same are incurred in the performance of his official duties as such Superintendent in such county, and the expenses incurred by him in the performance of his official duties when he is required to go outside the county? The present salary is less than \$3,000.00 per annum."

It is my opinion that under the provisions of Code, 1940, Title 52, Section 111, the County Board of Education of Clay County may authorize the payment of the traveling expenses incurred by the Superintendent of Education of that county in the performance of his official duties within the county and the expenses incurred by him when his official duties require him to go outside of the county.

Code, 1940, Title 52, Section 111, is as follows:

"§111. Must devote entire time to office; salary; traveling expenses. —The county superintendent of education shall devote his entire time to public school business, and shall receive such compensation as the county board of education shall direct. In counties where superintendents of education are elected by direct vote of the qualified electors, the salary for the office must be fixed prior to the beginning of the term of office. The boards of education in counties, where the maximum salary of the superintendent of education is prescribed by law, are hereby empowered to fix, approve, and authorize the payment of the traveling expenses incurred by the superintendent in the performance of his official duties within the county and the expenses incurred by him when his official duties require him to go outside of the county.

"The superintendent of education, whose expenses are authorized to be paid under the provisions of the last four paragraphs of this section, are hereby required to file with the county board of education on or about the first day of each month a certified itemized statement of the

traveling expenses incurred by him in the performance of his official duties within the county and the expenses incurred by him when his official duties required him to go outside of the county, for the preceding month, upon forms to be prescribed by the state board of education. Upon the approval by the county board of education of the expenditures herein authorized, the same shall be paid as other obligations. The accounts shall be verified by affidavit, and the total of such accounts shall in no event exceed the sum of six hundred dollars per annum.

"It is hereby expressly declared that it is not the legislative intent of the last four paragraphs of this section to increase the salary of the superintendent of education of any county of the state but merely to reimburse the superintendent for necessary and legitimate traveling expenses actually incurred in the efficient performance of his duties. The provision of the last four paragraphs of this section shall not apply to superintendents of education whose salaries amount to three thousand dollars per annum or more **nor to any superintendents of education who receive expenses under local acts heretofore passed by the legislature of Alabama.**

"Provided, however, that the last four paragraphs of this section do not repeal or invalidate any general law on the subject which has local application based on a county population basis." (Emphasis supplied)

Section 2 of the Local Act of 1935 to which you refer in your letter of inquiry (Act No. 313, H. 723, approved September 2, 1935, Local Acts, 1935, page 192), provides as follows:

"Section 2. That Section 2 of said Act be amended so as to read as follows: Section 2. That the salary of said County Superintendent of Education shall be fixed by the County Board of Education of Clay County, Alabama, which salary shall not be less than \$2400.00 nor more than \$3000.00 per annum, **which said salary shall include the expenses of County Superintendent of Education**, other than for clerk hire, office expenses, stationary and stamps, **and no additional expenses shall be paid to or allowed said County Superintendent of Education other than as provided herein in said salary**, and which said salary shall be paid in the same way and manner as now provided under the general laws of the State of Alabama for the payment of the salaries of County Superintendents of Education in the several counties of the State of Alabama." (Emphasis supplied)

You will observe that under this section the County Board of Education of Clay County is authorized to fix a "salary" which, according to the statute, "shall include the expenses of said County Superintendent of Education." This provision cannot, in my opinion, be deemed an allowance to the Superintendent of Education of expenses within the exception contained in Code, 1940, Title 52, Section 111, to the effect that the section shall not apply "to any Superintendents of Education who receive expenses under local acts heretofore passed by the Legislature of Alabama."

It seems that the Legislature by the use of the language above noted had no intention of allowing expenses in addition to the salary authorized, but rather employed the terminology used in the act to give emphasis to its intention not to allow such additional expenses.

Indeed, the use of the language employed in Section 2 to prevent the allowance of expenses to the County Superintendent of Education may properly be deemed surplusage when considered in the light of the decision of the Supreme Court of Alabama in the case of **Woodruff v. Beeland**, 220 Ala. 652, 127 So. 235. In the Beeland case it was held that, in the absence of specific authority, a County Board of Education had no right to provide an expense allowance for the County Superintendent of Education in addition to his salary fixed by law.

Accordingly, it is my opinion that the language employed in Section 2 of Act No. 313, supra, was but an expression of the existing law. As Mr. Justice Gardner (now Chief Justice) of the Supreme Court of Alabama noted in **State v. Blair**, 238 Ala. 377, 383, 191 So. 237, 241, many instances of such precautionary expressions may be found in our statutes.

I have not overlooked the possibility that Section 111, supra, taken from a general law, was not intended to affect the Superintendent of Education of Clay County since specific provision to the contrary appeared in a prior local act. It is my opinion, however, that the authorities lead to a different conclusion.

The source of Section 111 is Act No. 160, S. 126, approved March 2, 1937 (General Acts, 1936-37, page 181).

Section 4 of this act is as follows:

"All laws and parts of laws in conflict herewith are hereby repealed."

While I recognize the rule that the presumption is against a general act repealing a local statute, such presumption must give way to a plain manifestation of a different legislative intent. As is stated in **Heck v. Hall**, 238 Ala. 274, 283, 190 So. 280, 287:

"A repealing clause will be given effect according to its express terms, even to a repeal of a special or local law."

Cf. **Shepherd v. Clements**, 224 Ala. 1, 141 So. 255.

It is clear from Section 4 of Act No. 160, supra, and from the other provisions of said act, that the Legislature clearly intended the statute to supersede all local laws save those expressly excepted. Had this intent not been expressed, no necessity existed for the exception inserted into Section 3 of said act excluding therefrom Superintendents of Education who received expenses under local acts passed prior to the effective date of Act No. 160, supra.

Since it appears that Section 111 of Title 52 has superseded the provisions of Local Act No. 313, *supra*, and since the Superintendent of Education of Clay County does not fall within the exceptions stated in said Section 111, it follows that the Board of Education of Clay County may authorize and pay the traveling expenses of the Superintendent as provided by Section 111. The opinion rendered under date of July 19, 1941, to Hon. Rascoe Maddox, Superintendent of Education, Chilton County, Clanton, Alabama, copy of which is enclosed for your convenience, is to be distinguished from the conclusions hereinabove reached in that the local act there considered contained express provision for the payment of expenses to the Superintendent of Education of Chilton County in addition to the salary.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 26, 1941.

Hon. D. C. Mathews, Member,
House of Representatives,
Grove Hill, Alabama.

Livestock—Licenses—Doing Business, Code 1940, Tit. 2, §384.

A person to be liable for livestock dealer's license must be "engaged in the business of," and not one who occasionally or incidentally falls within the category.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of July 16, 1941, in which you request my official opinion as follows:

"Please advise me on this point: Mr. A. is a farmer who owns a truck. He is not engaged in livestock dealing in any respect. Mr. B, his neighbor, also a farmer, is also engaged in dealing in livestock as a sideline and is qualified as such under Title 2, Sections 384-394, Code of Alabama, 1940.

"Mr. B. borrows Mr. A's truck to carry some cattle which he had purchased to the stockyard for sale. Please understand that this is not a practice of Mr. A's and Mr. B's but is a coincidence.

"Does this subject Mr. A to the requirement mentioned in the above sections as one engaged in 'the business of transporting' livestock?"

Your inquiry necessitates a consideration of Tit. 2, §384, Code of 1940, wherein "dealer," for the purpose of Subdivision 2 is defined. Said section is as follows:

"§384. Dealer defined.—Every person, engaged in the business of buying cattle, sheep, goats or hogs for resale or slaughter or who engages in the business of transporting, hauling or driving cattle, sheep, goats or hogs along any public road or highway of Alabama for resale, to market or for slaughter, or who engages in the business of slaughtering such livestock shall be deemed to be a dealer for the purposes of this subdivision." (Emphasis supplied)

This office in an opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, under date of November 25, 1940 (Quarterly Report of Attorney General, Vol. XXI, page 174), held that the sale of mules, accepted as partial payment by an automobile dealer, did not make the dealer liable for a license under Schedule 72 of the 1935 Revenue Act, which imposed a license tax on **"each person engaged in the business of buying, selling or exchanging horses, mules, jacks or jennets * * *"** (Emphasis supplied)

The holding of this opinion was bottomed upon the decisions of **Morning Star v. State**, 135 Ala. 66, 33 So. 485, and **State v. Levy Loan Company**, 25 Ala. App. 514, 149 So. 714. In the former case, it was held:

"Doing a single act, pertaining to a particular business, will not be considered, as has been held, engaging in or carrying on the business, yet a series of such acts would be so considered. *Lemons v. State*, 50 Ala. 130; *McPherson v. State*, 54 Ala. 224. However, as has again been held, a single act may be sufficient to constitute an 'engaging in or carrying on the business,' according to the intent with which the act is done, and other proof in the case. If a party makes all the necessary preparations to carry on the business, holds himself out for the business, solicits trade, and makes one sale, intending to continue the business, he is engaged in or carrying on the business, with the meaning of the law."

In accordance with the court decisions cited above, and the ruling of this office, I am of the opinion that Mr. A, under your statement of facts, is not "engaged in the business of transporting livestock" within the meaning and contemplation of Sections 384-394, Tit. 2, Code of 1940.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 28, 1941.

Hon. E. T. Knight, Chairman,
Board of Revenue, Cullman County,
Cullman, Alabama.

Convicts—Counties—Nonsupport—

1. County held not liable to dependents of one convicted and sentenced to hard labor for nonsupport, if, in fact, the county receives no benefit from labor of said convicts.

2. County Board of Revenue not authorized to pay claim filed against the county for use and benefit of dependents of one convicted of non-support if, in fact, the county receives no benefit from the labor of the convict.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 12, 1941, in which you request my official opinion as follows:

"We would appreciate your opinion upon the following:

"FIRST: Is the County liable to the dependents of one convicted and sentenced to hard labor for nonsupport under law applicable to Cullman County.

"SECOND: Is the opinion of June 28, 1927 to Mrs. Tunstall still in full force and effect, or is this County guided by the opinion of your office dated February 11, 1929 addressed to the Board of Revenue, Shelby County.

"THIRD: Does this County receive any benefit from the labor of convicts sentenced under Section 4480 of the 1923 Code and if so, into what fund is such sum paid, (there is no fine and forfeiture fund in this County).

"FOURTH: Should this Board pay the claim filed against this County, a copy which is hereto attached for your information and inspection."

In reply to your first question, I wish to advise that in my judgment the county is not liable to the dependents of one convicted and sentenced to hard labor for nonsupport if, in fact, the county does not receive any benefit from the labor of the convict.

You specifically ask concerning the county's liability under the law applicable to Cullman County. I assume that misdemeanor convicts of Cullman

County are delivered to the State Department of Corrections and Institutions and that, therefore, the law governing misdemeanor or hard labor convicts under the control of the State Department of Corrections and Institutions must necessarily apply to misdemeanor or hard labor convicts received from Cullman County.

The question of whether or not the county actually receives any benefit from the labor of the convict sentenced under Section 4480 of the Code of 1923 (Title 34, §90, Code of 1940), is a question of fact.

I call your attention to Section 3702(9) of the Code of 1923, as amended (Title 45, §98, Code of 1940), which provides as follows:

"§98. Accounting by department; disposition of earnings.—The Department shall render an accounting, annually as of January 1st of each calendar year, to and with the several counties of the state whose convicts it keeps and uses under the provisions of this article, and shall pay over to the proper officer of the several counties, to the credit of the fine and forfeiture fund of said counties, all the net earnings of the county convicts from the said counties. 'Net earnings,' as used herein, shall be held to mean the average earning of each convict, according to his or her classification, less all expenses of cost paid under Section 69 of this title, cost of maintenance, guarding, food, clothing, and all other costs and expenses actually incurred by the department, based on general averages according to classification."

You will note that the provisions of the above quoted Section 98, *supra*, require the State Department of Corrections and Institutions to render an accounting annually to the several counties of the State whose convicts it keeps and uses. It is further provided that the Department of Corrections and Institutions shall pay to the credit of the fine and forfeiture fund of the said counties all the net earnings of the county convicts from the said counties. You will note further that net earnings is defined as that sum, if any, which shall be left, over and above all costs to the State, of maintenance, guarding, food, clothing, costs and fees payable under the provisions of Title 45, §69 of the Code of 1940, as well as all expenses actually incurred by the State for and on behalf of such convict.

If, after the payment of all expenses above outlined by the State, any sum of money from the earnings of the convict is paid over to the county, then the county, in my judgment, must be said to have received benefit to the extent of the amount of such sum paid by the State. If no such sum is paid, then, in my judgment, the county is not liable to the dependents of one convicted and sentenced to hard labor for nonsupport for any sum to be paid out of the county monies.

I wish to refer you to the case of *Swindle v. State*, 225 Ala. 247, 143 So. 198, in which the Court, speaking to this question, said:

"The agreed statement of facts discloses that no fine has been paid or earned by the husband; that the county has received and will receive nothing for the hire of the convict to the state board of administration,

and that there are no net earnings to which the county will be entitled; that compensation for the support of the wife and children, if it is to be made, must be at the rate provided by the statute from the general funds of that county not otherwise appropriated. This would be an appropriation of the county's funds, 'or grant of public money' for private or individual purpose, 'in aid of, or to any individual' that was within the interdiction of section 94 of the Constitution under the judgment rendered by the circuit court.

"The petition should have been denied by the lower court on the pleading and agreed statement of facts showing that there were no available funds, and the county could not appropriate them under section 94 to individual aid. That is to say, if, on the other hand, there were such earnings paid to the county for services of that convict (delivered to the state board of administration under Gen. Acts 1927, pp. 52, 54), such moneys would have been available for the support (under sections 4480, 4481, Code) of the wife and children, either or both, as the case was; otherwise the general fund of the county was not available to that end—in aid of the individuals at interest.

"The county had the election to punish the convict at 'hard labor' pursuant to his conviction and judgment, or to deliver him for such purpose to the state board of administration. Having voluntarily elected and pursued the latter course of punishment of the convict, under the statute (Gen. Acts 1927, page 54) the county was entitled (under section 6 of said act) to have that board account for that labor and pay over the 'net earnings' to the county for the beneficiaries under the statute.

"Thus we are brought to the instant facts, where the county had no such earnings from the labor of that convict. If so, it must audit and pay the same; if not, it cannot use the general funds of the county for the aid of individuals, though they be the prisoner's immediate dependent family.

* * * *

"We may observe as to such 'earnings' or 'net earnings' of that convict, under section 4480 et seq., Code, that such special fund is impressed by that statute and the nature of the punishment imposed hereunder, and, when collected by the county, is impressed with or for the 'use of defendant's wife, or his child, or children, or both,' and shall be 'expended or disbursed for such use,' as directed by the statute. Such earnings do not become a part of the general fund of the county, nor of the special or fine and forfeiture fund of that county, as is generally provided for 'net earnings' of county convicts. Gen. Acts 1927, p. 54 §6. Such earnings, when collected by the county, are within the influence of chapter 157 of the Code, 'Husband and Wife,' page 445, §§4479-4481; and, when not so collected, may not be paid out of the general fund of said county (for the benefit of the convict's family) which is not available for such purpose and to do so would be offensive to section 94 of the Constitution."

In my judgement, the Supreme Court in the above noted excerpt from the case of *Swindle v. State*, supra, has answered your first and third questions specifically.

For purposes of convenience, I prefer to answer your fourth question next.

The claim attached is a claim for fifty cents per day for the use of the dependents of one convicted under Section 4481 of the Code of 1923 (Title 34, §91, Code 1940), and is filed by the Clerk of the Juvenile Court of Cullman County. In my judgment, the Board of Revenue of Cullman County can not legally pay the claim here filed, unless the county has actually received benefit from the labor of the convict as pointed out in my combined answers to your first and third questions, *supra*.

In reply to your second question, I wish to advise that the opinion of June 28, 1927, addressed to Mrs. Tunstall and reported in the Biennial Report of the Attorney General, 1926-28, page 210, is hereby modified to conform to the above, and the opinion to the Board of Revenue, Shelby County, under date of February 11, 1929, reported in Biennial Report of Attorney General, 1928-1930, page 183, is hereby followed.

The opinion to Hon. M. T. Maxwell, Clerk, County Board of Revenue of Tuscaloosa County, reported in Biennial Report of Attorney General, 1930-1932, page 377, is hereby overruled.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 28, 1941.

Hon. Wm. R. Rountree, Jr.,
Judge, Court of Common Pleas,
Selma, Alabama.

Courts—Inferior Courts—Courts in lieu of Justices of the Peace—
Constitution 1901, Section 168—Solicitors—Costs and fees—Local Acts,
1932, page 7—

The Court of Common Pleas of Selma held to be an inferior court under Section 168 of the Constitution and there is required to be taxed and collected solicitors' fees as provided by law.

Opinion by Assistant Attorney General Hare.

Dear Sir:

Your letter of June 25, 1941, in which you request an official opinion, is as follows:

"The Court of Common Pleas of Selma was established by the Act of the Legislature of Alabama as shown beginning at Page 7 of the bound

volume of the Local Acts at the extra session of 1932, and is created in lieu of Justices of the Peace and Notaries Public with power of Justices of the Peace in and for Precinct 36 Dallas County, Alabama.

"Said Court has a jurisdiction similar to that of Justice of the Peace and no more.

"Under an opinion rendered some considerable time ago, by the then Attorney General of the State of Alabama, it has not been the practice to assess and collect Solicitor's fees in said Court.

"Please advise as to whether we are correct in the above procedure of not assessing and collecting Solicitor's fees in connection with the cases tried in said Court."

The Court of Common Pleas of Selma was created by Act No. 25, S. 39, approved September 17, 1932 (Local Acts, 1932, page 7) under the authority of Section 168 of the Constitution of Alabama of 1901, which, in pertinent part, is:

"* * * Where on or more precincts lie within, or partly within, a city or incorporated town having more than fifteen hundred inhabitants, the legislature may provide by law for the election of not more than two justices of the peace and one constable, for each of such precincts, **or an inferior court for such precinct or precincts**, in lieu of all justices of the peace therein. * * *" (Emphasis supplied)

Section 1 of said Act reads as follows:

"§1. That there is hereby established an inferior court in precinct number 36 in Dallas County, Alabama, which shall be known and designated as 'The Court of Common Pleas of Selma', and **which shall be in lieu of all justices of the peace and notaries public with power of justice of the peace**. It shall have the jurisdiction now held by justices of the peace or that may hereafter be conferred by law on justices of the peace, or on said court, and the judge of said court shall have and exercise all the power and authority, and perform all the duties now or hereafter prescribed by law, for justices of the peace in said precinct. Said judge shall have the same right and privileges and be subject to the disabilities and penalties as may now or hereafter apply by law to justices of the peace." (Emphasis supplied)

By Section 11 of said Act, it is provided:

"* * * that the Deputy Solicitor of said County is hereby required to represent the State in all criminal causes in said court, and for his services therein shall receive a salary of \$50.00 per month payable out of the General Fund of said County by warrant drawn by the Probate Judge on said County Treasurer."

From the above quoted sections from the Act and the Constitution, it is apparent that, under Section 168 of the Constitution, the court so created

is an inferior court, and that attendance thereon is required of the deputy solicitor in the trial of criminal causes.

Title 11, Section 86, Code 1940, deals with the taxation and collection of Solicitors' fees.

"§86. Solicitors' fees; how taxed and collected.—For every conviction for a misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitor's fees provided for conviction in such cases in the circuit court, provided that in the event of an appeal to the Circuit court no solicitor's fees shall be taxed or collected for the services of a solicitor in the circuit court."

The premises considered, I am of the opinion that the Court of Common Pleas of Selma in an inferior court under Section 168 of the Constitution of Alabama of 1901 and, as such, there is required by the provisions of Title 11, Section 86, supra, to be taxed and collected solicitors' fees in convictions for misdemeanors as provided in such cases in Circuit Courts and as may be otherwise provided by law. (For example, see Title 8, §50; Title 11, §81)

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 28, 1941.

Hon. A. H. Collins,
Superintendent of Education,
State of Alabama,
Montgomery, Alabama.

Schools—Teachers—Contracts—

Where a principal has attained continuing service status his contract continues in force until cancelled as provided in Code 1940, Tit. 52, Chapter 13 (§§351-361), and a conditional resignation does not operate to deprive him of compensation until the effective date of such resignation.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of July 14, 1941, is as follows:

"In an opinion rendered to Mr. Sam Morgan, County Superintendent of Education of Crenshaw County, on June 30, 1941, you held that a principal employed in 1937 who began work July 1, 1937, but whose contract of employment did not begin until October 1, 1937, was not entitled to pay for the three months between July 1, 1937, and October 1, 1937. While your reply answers the question as to the payment of salary from July 1, 1937, to October 1, 1937, no question was asked you concerning the payment of this principle's salary from July 1, 1941, to October 1, 1944.

"In the letter addressed to you by Mr. Sam Morgan, County Superintendent of Education, the fact was brought out that the original contract of employment of this principal dated from October 1, 1937, to September 30, 1938. His contract of employment for the succeeding year dated from October 1, 1938, to September 30, 1939. However, on July 1, 1939, a contract of employment was given this principal dated from July 1, 1939, to June 30, 1940. Subsequently, his contract for the succeeding year was dated July 1, 1940, to June 30, 1941. On or about June 25, 1941, and prior to July 1, 1941, the principal submitted his resignation in writing to the Crenshaw County Board of Education, effective October 1, 1941. Your attention is directed to Section 353 of Title 52 of the Code of Alabama of 1940, which reads as follows:

"Section 353. Contract of employment effective until superseded or cancelled.—The contract of employment of any teacher who shall attain continuing service status shall remain in full force and effective unless superseded by a new contract signed by both parties, or cancelled as provided in section 357 or section 358 of this title; provided that the legislature, or in the absence of legislation, the employing board of education may provide for the retirement of teachers at certain ages."

"Section 359 of Title 52 of the Code of Alabama of 1940 provides that a teacher must give written notice to the employing board of education of his resignation.

"Your attention is also directed to the fact that the salary of the principal has been paid by the Crenshaw County Board of Education in 12 equal monthly installments. Some boards of education pay principals on a scholastic basis which means that the annual salary of the principal is divided by the number of months in the school term. Other boards pay principals on the calendar basis, that is, the annual salary of the principal is divided by 12 and the salary paid monthly for each calendar month. There is no essential difference in the services rendered by principals paid on the calendar basis or on the scholastic basis. That is, during the months that schools are not in session, principals paid on both the calendar basis and scholastic basis are frequently not in residence in the community in which they teach. They may be attending summer school or taking a vacation, or they may be in residence in the community. That is, whether a principal is paid on a scholastic basis or on a calendar basis is merely a matter of bookkeeping and is not a different type of employment.

"The above principal has taught 4 full school years in Crenshaw County at a salary of \$2,400 per year for each year. He has been placed on the pay roll for only 3-3/4 years. That is, he was taken off the pay roll beginning July 1, 1941. The principal is on continuing service status under the provisions of Section 352 of Title 52 of the Code of Alabama of 1940.

"Your opinion is requested on the following questions:

"1. Since the principal is on continuing service status under the provisions of Section 352, supra, and since under the provisions of Section 353, supra, his contract continues in force until cancelled as provided in Sections 357 and 358 of Title 52 of the Code of Alabama of 1940, does his contract continue in full force and effect from July 1, 1941, until the date of his resignation unless his contract is cancelled in accordance with the provisions of Sections 357 and 358, supra, prior to the effective date of his resignation?

"In answering the above question, your attention is directed to an opinion rendered to Dr. J. S. Ganey on June 6, 1941, in which you held that a teacher who has completed his contract of service of 36 weeks is entitled to compensation for 12 months in accordance with the contract of employment, although he may be employed in another capacity before the expiration of said 12 months."

It is my opinion that since the principal in question has attained continuing service status, and since his resignation is not effective until October 1, 1941, he is entitled to be paid from July 1, 1941, to the date his resignation will become effective, i.e., October 1, 1941.

As noted in your letter of inquiry, Code 1940, Tit. 52, §353, provides that the contract of employment of a teacher having continuing service status shall remain in full force and effect unless superseded by a new contract signed by both parties or cancelled as provided in Section 357 or Section 358 of Title 52. It does not appear that a new contract was entered into, or that the principal's contract was cancelled in the manner provided by Sections 357 and 358 for any of the reasons set forth in Section 356. Accordingly, under the provisions of Section 353, supra, the contract of employment of the principal in question continued in effect from and after July 1, 1941. Cf. **Board of Education of Marshall County v. Baugh**, 199 So. 822, 824.

It appears from your letter of inquiry that the resignation received from the principal was not unconditional, but was to become final and effective only as of October 1, 1941. I assume that the acceptance of the resignation was likewise conditioned upon its becoming effective as of that date. Under this set of facts, the resignation cannot be said to be effective to deprive the principal of either his position or his salary between July 1, 1941, and October 1, 1941. That the resignation could be withdrawn (subject to the restrictions in Section 359) before its effective date, if desired, is clearly indicative of the fact that the principal was not deprived of his position nor of his compensation until such date. *State ex rel. Almon v. Fowler*, 160 Ala. 186, 189, 48 So. 985; 46 C. J. 976, Section 130, Note 56.

It necessarily follows, therefore, since the contract of the principal was still in full force and effective, that he would be entitled to compensation until the effective date of his resignation, i.e., October 1, 1941. Cf. Quarterly Report of Attorney General, Vol. XIII, page 201.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 28, 1941

Hon. D. B. Borden, Clerk,
Circuit Court, Hale County,
Greensboro, Alabama.

Costs and Fees—Juvenile Courts—

Where probation is granted under Section 3546, Code of Alabama, 1923 (Code 1940, Tit. 13 §370), which order of probation includes the suspension of the term of imprisonment including the time to be served necessary to pay the cost, said cost cannot be paid by the Department of Corrections and Institutions under Section 3667, Code of Alabama, 1923 (Code 1940, Tit. 45, §69), or from any other fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 10, 1941, in which you request my official opinion as follows:

"I shall appreciate you giving me an official opinion on the following:

"When a defendant is placed on probation under Section 3545, Code of Alabama, 1923, is it a legal claim to present a bill of costs in such case to the Department of Corrections and Institutions? Should your answer be in the negative, please advise me from what fund the cost in this case is to be paid out of."

Section 3545, Code of Alabama, 1923 (Code 1940, Tit. 13, §370), the section under consideration, which is applicable alone to prosecutions in Juvenile Courts of persons causing dependency, neglect or delinquency of children, provides in pertinent part as follows:

"The judge of such court shall have authority, in his discretion, to suspend the payment of any fine, or the serving of any term of imprisonment, whether in jail or at hard labor, or both, such fine and sentence, and to place such accused person on probation, for a period of time not to exceed twelve months, and upon such terms and conditions as to the judge may seem proper."

I assume that the judge, under the provisions of said section, in his order of probation, suspended the payment of the fine and also the serving of the term of imprisonment, which term included the amount of time to be served necessary to pay the judgment for costs.

Based on this assumption, I know of no way in which the costs can be paid.

As the defendant was not delivered to the Department of Corrections and Institutions, **said costs cannot be paid under authority of Section 3667, Code of Alabama, 1923 (Code 1940, Tit. 45, §69).** See Section 3670, Code of Alabama, 1923 (Code 1940, Tit. 45, §72); Quarterly Report of Attorney General, Vol. VII, page 81; Quarterly Report of Attorney General, Vol. XII, page 168.

These costs in question could not be paid out of the Fine & Forfeiture Fund of the county or its equivalent under Section 4039, Code of Alabama, 1923, as amended (Code 1940, Tit. 15, §393), in view of the fact that execution could not issue against the defendant and be returned "No Property Found." When sentence for costs is suspended execution cannot be issued against the defendant. Quarterly Report of Attorney General, Vol. XVIII, page 179.

I know of no other fund out of which these costs can be paid. The law of costs and fees is penal in its nature and must be strictly construed. No costs shall be paid unless specifically authorized by law. Section 3734, Code of Alabama, 1923 (Code 1940, Tit. 11, §79); **State, Ex Rel Pollard vs. Brewer**, 59 Ala. 130.

The opinions of this office found in Quarterly Report of the Attorney General, Vol. XVII, page 87, and Quarterly Report of Attorney General, Vol. XXI, page 27, have no application to the instant case, as said opinions deal only with Act No. 278, S. 198, approved August 24, 1939 (General Acts, 1939, page 434), which provides for probation and suspension of sentence in general. The principle set out in said opinions have no application to Section 3545, Code of Alabama, 1923 (Code 1940, Tit. 13, §370), *supra*.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 28, 1941.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Extradition—Costs and Fees—Sheriffs—Judges of Probate—

1. The probate judge is without authority to order a prisoner charged with a criminal offense in this state brought back from another state for trial.

2. Where a prisoner charged with a misdemeanor is extradited from a foreign state, the county and not the state pays expenses of extradition.

3. The expense of extradition includes the fees of the foreign sheriff making the arrest and confining the prisoner in jail, and such fees, if the defendant is charged with a misdemeanor, are paid by the county.

4. If a defendant charged with a misdemeanor is extradited on the order of the Governor, the costs of extradition are paid without reference to whether the defendant is convicted or not.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of May 17, 1941, in which you request an official opinion, is as follows:

"I have searched the statutes and the opinions of your office and I cannot find an answer to the following:

"A warrant is sworn out in Houston County for a person charged with a misdemeanor. He is apprehended and placed in jail in another state.

"The Sheriff of this county applied to me for a removal order. I refused because I can find no authority for a county to pay the expense of removing a prisoner charged with a misdemeanor from another state to this county for trial.

"Please advise me as follows:

"1. Can the Probate Judge order the removal by the Sheriff of a prisoner from another state back to this county when the said prisoner is charged only with a misdemeanor?

"2. Does the county have authority to pay the Sheriff for removing a prisoner from another state back to this county for trial when the prisoner is charged only with a misdemeanor?

"3. If the county does have such authority, does such authority extend to the expense of the sheriff of the other state in making the arrest, his mileage, guard fees, feed bill, etc.?

"4. If the county does have such authority, is same payable out of the General Funds of the County, or the Fine and Forfeiture Fund?

"5. If the county has no such authority, can the Sheriff's expense be taxed as costs against the defendant if convicted?

"6. If taxed as costs against the defendant and not paid and the defendant is sentenced for said costs, will the state pay same on proper presentation of the claim?

"7. If such costs are not paid by the state, can the sheriff collect same from the Fine and Forfeiture Fund?

"8. If the defendant is not convicted, or if the case is not prossed, can the sheriff then collect his expenses out of the Fine and Forfeiture Fund or the General Fund of this county?

"If these questions have heretofore been answered, I will thank you to refer me to the volume and page. Most all opinions found have reference to the return of felons."

My answer to your first inquiry is in the negative. You, as Judge of Probate, can only make such order when the defendant is arrested and confined in a jail of a county in this state other than that in which he is triable or arrested. Code, 1940, Title 15, Sections 180, 181. You have no authority as Judge of Probate to issue an order for removal of a prisoner charged with a crime, either misdemeanor or felony, arrested in another state on a charge from this state can do this by requisition on the Governor of the foreign state. I call your attention to Code, 1940, Title 15, Sections 48-75. You are particularly directed to Sections 71 and 72, which are as follows:

"§71. Manner of applying for requisition.—When the return to this state of a person charged with crime in this state is required, the prosecuting attorney (of the county in which the offense is committed) shall present to the Governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, and the approximate time, place and circumstances of its committal, the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial, and that the proceeding is not instituted to enforce a private claim. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the magistrate, stating the offense with which the accused is charged. The prosecuting officer may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application with the action of the Governor indicated by indorsement thereon, and one of the certified copies of the indictment or complaint or information and affidavit, shall be filed in the office of the Secretary of State to remain of record in that office. The other copies of all papers shall be forwarded with the Governor's requisition."

"§72. Expense of bringing back absconding felon on requisition; how paid.—When the punishment of the crime shall be the confinement of the criminal in the penitentiary, or by death, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of

the comptroller; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The sheriff or other agent shall receive two dollars per day while going to and returning from the place where the prisoner is arrested or confined, and actual necessary expenses, including expenses of transportation; if train or bus is used, actual cost of transportation shall be allowed, but if the trip is made in the personal car of the sheriff or other agent of the state there shall be allowed for transportation five cents for each mile traveled. There shall also be allowed the fees paid to the officers of the state on whose governor the requisition is made."

My answer to your second inquiry is in the affirmative where the fugitive is returned to this state under extradition issued by the Governor of this state. See Section 72, supra, Quarterly Report of Attorney General, Vol. I, page 159.

My answer to your third inquiry is in the affirmative, that is, if you refer to the fees of the sheriff of a foreign state in making the arrest and confining the defendant. I call your attention to the latter part of Section 72, supra, where it says:

"There shall be allowed the fees paid to the officers of the state on whose governor the requisition is made."

Answering your fourth inquiry, the fees you refer to in your third inquiry are required by Section 72, supra, to be paid out of the **county treasury** if the defendant is charged with a misdemeanor. It has been held, under such a mandate, that payment must be made from the general fund of the county. *Weaver v. Tidwell*, 228 Ala. 169, 153 So. 218; Quarterly Report of Attorney General, Vol. I, page 159.

In view of the conclusions which I have reached in answering the above inquiries, there is no necessity for answering your inquiries numbered 5, 6 and 7.

Your eighth inquiry is answered by the express provisions of Section 72, supra, wherein it is stated, with respect to the expense of bringing back a fugitive by extradition, that "in all other cases they (the expenses) shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed." There is no requirement in the statute that the payment of the expenses is contingent on conviction. The absence of such a contingency, with respect to felony cases, has been heretofore noted by this office. Biennial Report of Attorney General, 1934-36, page 277. The reasoning employed in that opinion is applicable to misdemeanor cases.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 28, 1941.

Hon. Chas. Edgar Young,
Clerk Circuit Court,
Lauderdale County,
Florence, Alabama.

**Fines and Forfeitures—Motor Vehicle Licenses—Solicitor's Fees—
Distribution of Fines—**

1. Minimum fine for driving automobile without Alabama motor vehicle license held to be the amount of the license due. Minimum fine for refusing to buy motor vehicle license held to be cost of license and an additional nominal fine.
2. Solicitor's fees for violation of Revenue Law held to be \$30.
3. Fines collected in such cases to be distributed two-thirds to State and one-third to county.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request of April 3, 1941, for official opinion is as follows:

"Defendant was arrested by Highway Patrol Officer for having and operating an automobile in Lauderdale County, Alabama with Tennessee License Plate on both front and rear of the car when there should have been Alabama License plates. That is the first case.

"This same defendant was released on bond and his car released to him. About a month later the same officer again arrested him with another set of Tennessee License Plates on the car, one on front and one on rear of the same car for which he was arrested in the first case set out above.

"He has, therefore, two cases pending in our courts. (1) Under what section is he chargeable in each case (if there is any difference in his offense.) (2) What Solicitor's fee is chargeable in each case? (3) What is the lowest fine for said offense and where should I as Clerk pay said fine, to the County or to the Revenue Department?"

I note from the correspondence attached to your request that you state that the defendant in this case should have had Alabama license plates on his car. I assume, therefore, that the defendant does not fall within any of the exceptions provided by law applicable to non-residents of the State of Alabama and pertinent to this question.

I wish to call your attention to Section 352(a) of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256), which provides as follows:

"SECTION 352. (a) It shall be unlawful for any person, firm or corporation to engage in or carry on any business, or do any act for which a license is required now or may hereafter be by law, without having first paid for and taken out a license therefor in the manner in this Act provided. Any person who is convicted of failing to take out and pay for the license required shall be fined not less than the amounts of all license required of him, and if convicted for refusing to take out the license shall on conviction, be fined not less than the amount of the State and county license due by him and not more than one hundred dollars (\$100.00) in addition thereto, and may be sentenced to hard labor for the county for not more than six months; all fines to be paid in money, and when collected, two-thirds shall be paid to the State and one-third to the county."

This section now appears in the Code of 1940 as Section 834 of Title 51. You will note that the provisions of this law render it unlawful to do any act for which a license is required without having first paid for and taken out the license provided for such act by law.

I particularly call your attention to the provisions of Section 352, supra, as follows:

"* * * Any person who is convicted of **failing** to take out and pay for the license required shall be fined not less than the amount of all licenses required by him * * *" (Emphasis supplied)

Under this provision, it is my judgment that the offense denounced is the mere **failure** to procure the required license and the minimum fine must necessarily be the amount of the license required of the defendant to drive an automobile upon the public highways of the State of Alabama.

I wish to further call attention, however, to a continuation of Section 352, supra, which provides:

"* * * And if convicted for **refusing** to take out the license shall on conviction, be fined not less than the amount of the State and County license due by him and not more than \$100.00 in addition thereto, and may be sentenced to hard labor for the County for not more than six months." (Emphasis supplied)

If it be a case of **refusal** to take out the required license and if the defendant be convicted thereof, he should be fined not less than the amount of the State and County license due by him and in addition thereto, any amount of money not to exceed \$100. To this fine, of course, may be added additional punishment by sentence to hard labor for the County for a period not to exceed six months. You will note that no minimum is prescribed for the additional fine. It is, therefore, my judgment that the amount of that part of the fine in addition to the amount due for license lies within the discretion of the judge trying the case, the minimum being a nominal amount and the maximum being \$100.00. Biennial Report of Attorney General, 1928-30, page 717.

As to whether or not a particular case is one of failure or refusal to secure a required license is a question of fact to be determined by the court or jury, as the case may be.

I wish to call your attention to an opinion of the Attorney General reported in Quarterly Report of Attorney General, Volume XVI, page 132, the last paragraph of which states in part as follows:

"You are advised that prosecutions may be brought either under this section (Section 352(a)) or under the provisions of Schedule 158.16 which makes it unlawful for any person 'to use upon his car any tag in imitation of or substitution for real tags unlawfully used'."

It is my more mature thought that error appears in this last paragraph, inasmuch as there I held that prosecutions could be brought upon the theory that the use of foreign state tags upon motor vehicles to evade payment of an Alabama license was a substitution for the tags required. It is my opinion that the act of using the foreign state tag unlawfully, in Alabama constitutes the offense of driving a car without a license as required by Alabama law. I, therefore, overrule that part of the above quoted portion of the named opinion insofar as Schedule 158.16 is concerned.

In reply to your second question, I wish to advise that the solicitor's fee taxable in the case upon conviction is \$30. I refer you to Section 3738 of the Code of 1923 (Code 1940, Tit. 11, §85), which provides in part as follows:

"For each conviction of a violation of the Revenue Law not otherwise provided for\$30."

Biennial Report of Attorney General, 1930-32, page 399.

In reply to your third question concerning the minimum fine for the offense named by you, I wish to refer you to the answer to your question numbered one.

The disposition of fines imposed in the cases under consideration is controlled by that part of Section 352(a), supra, which provides as follows:

"All fines to be paid in money, and when collected two-thirds shall be paid to the State and one-third to the county."

Cf. Quarterly Report of Opinions of Attorney General, Vol. I, page 11.

I observe from your statement of facts that the arrest in the present case was made by a highway patrolman and for this reason, it is necessary to consider any fee or penalty which might be due to the license inspector had the license inspector instituted the criminal prosecution named herein.

I wish to refer you to the question numbered three of an opinion addressed to Hon. B. P. Singleton, Chief Examiner of Public Accounts, Capitol, under date of November 5, 1940, reported in Quarterly Report of Attorney General,

Volume XXI, page 140, which is in direct conflict with the holding herein announced and is hereby expressly overruled.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 28, 1941.

Hon. J. W. Stacks, Clerk,
Circuit Court and County Court,
Tallapoosa County,
Dadeville, Alabama.

County Courts—Trial—Witnesses—

1. Judge of county court, in his discretion, may try cases on any day during the week except Sunday, where defendants cannot give bond and security for their appearance at regular terms of court or desire immediate trial. In such cases fees and mileage of witnesses summoned for the state should be taxed.

2. If the clerk of the county court on a plea of guilty does not assess the proper costs against the defendant, then such clerk is liable for such costs.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 21, 1941, in which you request my official opinion as follows:

“Under the provision of law in such cases made and provided, I hereby request your opinion on the following questions:

1. A witness is summoned by the State in a criminal prosecution, in County Court. Before the regular trial date, the defendant goes before the Court, pleads guilty, and pays his fine and costs. Is the Clerk liable for the fees of the witness if he appears at the regular term of court?

“2. A defendant is arrested on a misdemeanor charge and makes bond, in County Court. May he go before the Judge at any time before the regular term of Court, plead guilty, and then and there pay the fine and costs and secure his discharge?”

Assuming that your first inquiry is predicated on the facts set out in your second inquiry, I deem it advisable to answer your inquiries in inverse order.

I am of the opinion that your second inquiry should be answered in the affirmative. The Code of 1940, Title 13, Section 322 provides for the regular monthly terms of county courts. However, Section 325 of said Title provides as follows:

"§325. Courts always open for trial of certain cases. — The county courts in the several counties in this state shall be open, at the discretion of the judges, any day during the week, except Sunday for the trial of offenses coming within their jurisdiction, in all cases where the party or parties charged cannot give bond and security for their appearance at the regular terms of said courts, or desire an immediate trial; and, in such cases, causes may be continued for good cause shown under the regulations governing the continuance of causes in justices' courts; but nothing herein contained shall be so construed as to prevent or interfere with the regular terms of county courts."

It will be noted that county courts are open for trial, at the discretion of the judges (any day during the week except Sunday) when the defendant (1) cannot give bond and security for his appearance at the regular terms of said court, or (2) desires an immediate trial.

In the instant situation the defendant plead guilty, which plea was accepted by the Court. This being true, it necessarily follows that the said plea was allowed at the discretion of the Judge and that the defendant desired an immediate trial, thus meeting the conditions precedent required by Section 325, *supra*.

In answer to your first inquiry, I wish to refer you to that part of an opinion rendered to the Clerk of the Circuit Court, Pike County, under date of October 28, 1937, (Quarterly Report of the Attorney General, Volume IX, page 50), dealing with a situation analogous to the instant inquiry, which reads as follows:

"It is my opinion that such a procedure as you mention was never contemplated by the law-makers, for, as far as I can find, there is no statute setting out the method whereby a defendant may plead guilty and be sentenced between terms of court. I might suggest that if the judge would allow the defendant to plead guilty between terms of court but not sentence him until the day set for trial, he would obviate a great deal of confusion.

"If, however, a defendant is allowed to plead guilty between terms of court and is also sentenced at that time, I am of the opinion that the clerk should include in the cost bill the fees and estimated mileage of all witnesses subpoenaed on the part of the states'. Section 3763, Code of Alabama, 1923 provides in part as follows:

"'3763. The fees of witnesses, subpoenaed on the part of the state to appear before . . . any court in which a criminal prosecution is pending, must be taxed against the defendant if he is convicted"

"If the witnesses appear, they unquestionably are entitled to their fees and mileage. **Section 3762, Code of 1923** as amended by **Act No. 105, General Acts 1932**, p. 102. If the witnesses do not appear, however, I am of the opinion that the defendant should receive a credit of their fees and mileage."

The above quoted excerpt is adhered to with the exception of the first sentence contained therein, which sentence is hereby overruled and the same is modified to conform to the provisions of Section 325, *supra*.

In an opinion of this office, reported in Biennial Reports of the Attorney General, 1930-32, page 254, it was held that the clerk of the circuit court is liable for failure to tax the proper amount of costs against a convicted defendant. The holding of this opinion is applicable to clerks of county courts.

I suggest that, in instances like the one under consideration, the clerk notify the witnesses that the defendant has plead guilty and they need not appear on the day set for the trial of the case. Cf. Quarterly Report of the Attorney General, Volume XIV, page 317.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 28, 1941.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Coroners—Costs and Fees—Inquests—

1. Coroner held not entitled to fees and mileage for conducting preliminary examinations of dead bodies made without aid of physician.
2. Coroner held entitled to mileage and fees as provided by law for attendance upon post mortem examination of dead bodies when said examination is made by qualified physician.
3. Inquests—inquests as provided for by Title 11, Section 94, Code of 1940, contemplates the attendance of a coroner's jury.
4. Inquest—Coroner may be paid fees for holding inquest only when ordered to do so by the Judge of Court of record or the solicitor of a court of record upon review of preliminary evidence obtained by the county and presented to the said court or the said solicitor.

Sheriffs—Costs and Fees—

Sheriffs held entitled to ex-officio fees only upon proper proof being made to the county governing body that he has performed the service required.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter of June 27, 1941, in which you request an official opinion, is as follows:

"I hereby request your opinion as to whether or not the Coroner of Houston County is entitled to mileage where he has made an examination of a dead body without first getting an order from a Judge of a Court of record or a Solicitor. In considering this question, I call your attention to the fact that Section 4559, Code of Alabama, 1923, was amended by Act 445, approved Sept. 9, 1927, which amendment is incorporated in Section 78, Title 15 of the 1940 Code.

"I would also like your opinion on whether or not an inquest as referred to under Section 94, Title 11, of the 1940 Code means that a Jury must be in attendance, or whether there can be a Coroner's inquest without a Jury.

"I would also like your opinion on whether or not a Coroner is ever entitled to a fee for holding an inquest, either with or without a Jury unless he be ordered to do so by a Judge of a Court of Record or by the Circuit or County Solicitors. In answering these questions I should like for you to consider Article 8 of Chapter 2, Title 11, Code of 1940, together with Chapters 3, Title 15, of the 1940 Code.

"I further request your opinion as to whether or not the governing body of Houston County may legally pay the Sheriff his ex-officio road fees unless proof is made to the governing body of Houston County by the Sheriff that he has performed certain services as contemplated in the Section authorizing a fee of \$90.00 per year."

In my opinion your first question must be answered conditionally.

It must be noted at the outset that the duties of the coroner with respect to dead bodies, when the cause of death is unknown and no physician was in attendance upon the deceased at or prior to time of such decease, are definitely provided by law. First, a preliminary examination of such dead body must be performed. Section 78 of Title 15 of the Code of 1940, provides in pertinent part as follows:

"* * * When a coroner has been informed that a person is dead in the county, and that said person died without being attended or examined by a legally qualified physician, the coroner shall forthwith proceed to the

place where the dead person is lying, and examine the dead body to ascertain the cause of death, and report the same in the same manner as inquests are reported; * * *

This requirement of examination immediately upon information by the coroner is qualified, however, by further provisions of law found in the Code of 1940, Title 15, Section 76, which provides in pertinent part as follows:

"When a coroner has been informed that a person has been killed, or suddenly died under such circumstances as to afford a reasonable ground for belief that such death has been occasioned by the act of another by unlawful means, he must forthwith make inquiry of the facts and circumstances of such death by taking the sworn statement in writing of the witnesses having personal knowledge thereof, and submit the same to a judge of a court of record or a solicitor; * * *"

While the circumstances surrounding the ascertainment of death are different, nevertheless, the examination of the dead body immediately upon reception of the information of death, by the coroner is required. In those cases in which reasonable grounds for belief is afforded that such deaths was caused by the unlawful act of another, the coroner must take the sworn statements of the witnesses having personal knowledge thereof, and present the same to a judge or solicitor of a court of record.

Concerning compensation of the coroner and mileage for conducting the examinations named above, I must advise that it is my opinion that none is provided by law and none can be paid. The coroner is a public officer, and subject to the provisions of law governing the payment of fees of public officers (See Code 1940, Title 12, Section 54).

The law of costs and fees is penal in nature and no fees, compensation or expense can be charged in the absence of a definite provision of law authorizing the payment thereof (Code 1940, Title 11, Section 79). The statutes controlling payment of officer's fees must be strictly construed.

Lee vs. Smyley, 16 Ala. 773;

Dent vs. State, 42 Ala. 514;

Greene County vs. Hale County, 61 Ala. 72;

Troup vs. Morgan County, 109 Ala. 162, 19 So. 513.

With these rules of construction binding upon us, we consider the schedule of fees for coroners, as set out in the Code of 1940, Title 11, Section 94, and find no provision for payment of any fees or mileage for the type of examination by coroners thus far considered. The necessary conclusion is, that, as concerns the type of examination thus far considered, the coroner cannot receive any fees for mileage.

I wish, however, to call your attention to the Code of 1940, Title 15, Section 78, which provides in pertinent part as follows:

"* * * when the coroner is unable to determine the cause of death, he may summon any physician or surgeon, who shall make an external post-mortem examination of the dead body, and report his opinion of the cause of death to the coroner in writing; if the surgeon or physician is unable to determine the cause of death from an external post-mortem examination, and the coroner has reasonable cause to believe that deceased came to his or her death by unlawful means, the coroner may in such cases order any physician or surgeon to perform an autopsy or internal operation on the dead body, and report findings of said autopsy to the coroner in writing."

For attending this post-mortem examination, held after the coroner has made a preliminary examination and is unable to determine the cause of death, as heretofore considered, the law provides fees and mileage as follows:

"For attending post mortem examination, where no jury is summoned, and returning opinion of surgeon or physician, five cents for each mile traveled in going and returning, and one dollar, to be paid, and to be taxed as costs in the same manner as fees for holding inquests." (Code 1940, Title 11, Section 94)

In reply to your second question, it is my opinion that a very distinct difference exists and is indicated by the law, between examinations of dead bodies, required of coroners, and an inquest held by a coroner. An inquest is authorized by the Code of 1940, Title 15, Sections 76, et seq.

Section 76, *supra*, provides as follows:

"§76. PROCESS OF HOLDING CORONER'S INQUEST; JURY OF INQUEST SUMMONED BY CORONER.—When a coroner has been informed that a person has been killed, or suddenly died under such circumstances as to afford a reasonable ground for belief that such death has been occasioned by the act of another by unlawful means, he must forthwith make inquiry of the facts and circumstances of such death by taking the sworn statement in writing of the witnesses having personal knowledge thereof, and submit the same to a judge of a court or a solicitor; and if upon such preliminary inquiry the judge or solicitor is satisfied from the evidence that there is reasonable ground for believing that such death has been occasioned by the act of another, by unlawful means, he must direct the coroner to forthwith summon a jury of six discreet householders of the county to appear before him forthwith at a specified place and inquire into the cause of such death, but no person shall be liable to serve as a juror more than one time during any one year, and no person shall be paid compensation for services as a juror on more than one inquest during any one year."

You will note that an inquest may be held only upon order of a judge of a court of record or a solicitor of such court. This order may be issued only when said judge or solicitor has been satisfied by the report of the coroner based upon a preliminary examination, that the deceased person met death through the unlawful act of another, who at the time of the issuance of said order is not publicly known to have committed the act causing the death inquired about.

State vs. Hogan, 204 Ala. 325, 85 So. 557;

Jefferson County vs. Abernathy, 139 Ala. 264, 35 So. 881, 883.

You will further note that the law contemplates the summoning of a jury before an inquiry becomes an inquest. The fees provided for attending inquests are provided only in those cases in which a jury is summoned.

Code of 1940, Title 11, Section 94, provides in pertinent part as follows:

“§94. CORONERS' FEES.—The coroner is entitled to the following fees:

For going to and returning from the place where he holds an inquest, five cents per mile each mile traveled.

For holding an inquest, when ordered by a judge of a court of record or by the circuit or county solicitor	\$2.50
For summoning jury on inquest	1.00
For each subpoena	.25
For each warrant of arrest	.50
For each bond or undertaking returned to court	.50

For attending post mortem examination, where no jury is summoned, and returning opinion of surgeon or physician, five cents for each mile traveled in going and returning, and one dollar, to be paid, and to be taxed as costs in the same manner as fees for holding inquests.”

In my judgment, an inquest as referred to in the Code of 1940, Title 11, Section 94, supra, contemplates the proper presence of a jury and there can be no coroners inquest as contemplated by law, in the absence of said jury. See Code 1940, Title 11, Section 95. Cf. **Sovereign Camp W.O.W. v. McLaughlin**, 237 Ala. 33, 185 So. 378.

Your third question has been answered by my reply to your second question, in the negative. I wish to further refer you to Biennial Report of Attorney General, 1934-36, page 136, and to Biennial Report of Attorney General, 1930-32, page 86.

In reply to your fourth question, I wish to refer you to an opinion of the Attorney General found in Quarterly Report of Attorney General, Vol. XII, at page 212, which answers your question specifically.

You will note that this opinion holds specifically that proof of services rendered must be made by the sheriff before he may be paid ex-officio fees for services required.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 28, 1941.

Hon. Coley Page,
Tax Collector,
Jackson Sounty,
Scottsboro, Ala.

Taxation—Exemptions—Industrial Plants and Factories—Code 1940, Tit. 51, §§3,4—Constitution 1901, §100.

1. Industrial plant or factory not entitled to exemption from county ad valorem taxation under Code 1940, Tit. 51, §3 as to any property in existence prior ot date of applying for such exemption as provided by Code 1940, Tit. 51, §4.

2. Where taxes had become a lien on the property of an industrial plant or factory on October 1 of the tax year prior to application for exemption under Code 1940, Tit. 51, §§3,4, the county governing body is not authorized to remit, release, postpone or reduce liability or obligation for taxes for such tax year. Constitution, 1901, §100.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of July 5, 1941 follows:

"Enclosed herewith I hand you copy of the application of Skyline Industrial Company for exemption from County taxes from August 4th, 1938, for a period of ten years; also, a copy of the minutes of the Commissioners' Court granting said petition exempting the Skyline Industrial Company from County taxes from August 4th, 1938, for a period of ten years.

"I desire your official opinion as to the validity of this resolution, as provided for in Section 1 of the General Acts of Alabama, 1939, page 529, approved Sept. 13, 1939.

"If said resolution by the Commissioners' Court exempts the Skyline Industrial Company from paying County taxes for a period of ten years from August 4, 1938, does it exempt said Industrial Company from paying County taxes for the year 1941, said resolution being entered on June 17, 1941, and the tax year beginning Oct. 1, 1940. Am I required to collect County taxes from said Company for the year 1941, and are they exempt from County taxes thereafter for a period of ten years from August 4, 1938?

"The Skyline Industrial Company has paid their taxes in full for the year 1940, and there are no outstanding taxes now due, but they are assessed for the year 1941."

On October 1, 1940 the lien of the State and County for 1941 ad valorem taxes attached to the property of said Skyline Industrial Company, in the absence of exemption therefrom at that time. Code 1940, Tit. 51, §884—Revenue Act 1935, p. 566, §372.

Said lien though inchoate at that time became effective for the amount of said taxes when fixed in accord with the procedure prescribed by statute, and when so fixed related back to October 1st next prior thereto as the effective date of the lien. **Driggers v. Cassaday**, 71 Ala. 529, 534; **Mann v. State**, 77 Ala. 545; **State v. Alabama Educational Association** 231 Ala. 11, 16, 163 So. 527; **United States of America v. State of Alabama**, May 26, 1941, U. S. Supreme Court.

The county governing body, and the legislature also by legislative act, it may be added, were powerless to remit, release, postpone or reduce the liability or obligation for such taxes for the year 1941. Constitution 1901, §100; **New Farley National Bank v. Montgomery Co.**, 203 Ala. 654, 84 So. 815; **Union Bank & Trust Co. v. Phelps**, 228 Ala. 236, 153 So. 644.

You are advised therefore that the resolution or order referred to above, cannot be construed to exempt said taxpayer from county taxes for 1941, and that you are therefore required to collect said taxes.

Whether the order or resolution aforementioned operates to exempt paying of county taxes for succeeding years would seem to be largely a question of fact.

The taxpayer's application for the exemption was filed under Section 1 of Act No. 405, H. 896, approved September 13, 1939, (Code 1940, Tit. 51 §3) providing for exemption, inter alia, of an "industry located within five miles of a rehabilitation colony sponsored by the rehabilitation administration of the federal government for the purpose of furnishing employment to the families thus rehabilitated." It further appears that applicant's factory or plant was built for the "manufacture of yarn and full fashioned hosiery."

Said application was made June 14, 1941, and avers that applicant's "plant or factory had not been completed nor had any of the machinery or equipment been installed therein nor was said plant ready for operation or in operation on September 13, 1939," (when the aforementioned Act was approved.)

For aught appearing, however, on June 14, 1941, when the application for exemption was first made said plant or factory was complete and in operation. Incidentally it appears that applicant was incorporated in Alabama August 4, 1938, in Jackson County, and that it assessed its property and paid taxes for 1940.

It thus clearly appears that applicant was not induced by the Act of September 13, 1939, *supra*, to build or enlarge its plant or factory, although at that time said plant was incomplete and not in operation.

The exemption applied for was available to applicant under Section 3 of the Revenue Act of 1935, as amended by Act No. 76, H. 64, approved March

26, 1936, (Gen. Acts, 1936 Ex. Sess. p. 44) when applicant was incorporated August 4, 1938.

This office has held that a plant or factory already built, without prior application for the exemption, is not thereafter entitled to the same. Quarterly Reports, Attorney General, Vol. XVII, page 283.

The statute itself purports to grant the exemption "for the purpose of encouraging the building, extending and operation of factories for the spinning of thread and yarns * * * and the manufacture of garments or wearing apparel, * * * or any other industry located within five miles of a rehabilitation colony," etc. (Code 1940, Tit. 51, §3.)

With respect to factories and plants "already built and operated," the exemption is available only to "extensions or additions." id.

Also the exemption is to be "for a period not exceeding ten years from the date of the incorporation or organization of such factories or plants if incorporated and organized under the laws of the State of Alabama."

It is to be observed that the exemption must be applied for. The statute granting the right to obtain the exemption is not only not self-executing but is silent also as to the time from which it shall become operative after application made and granted. The application must be made to the governing body of the county, for exemption from county tax, and to "the constituted authorities of the city or town," for exemption from municipal tax, "in which it is proposed to locate" the factory or plant. (Code 1940, Tit. 51, §4). Impliedly at least the grantors of the exemption should consider the application therefor and exercise their judgment before granting the same. They are free to deny the grant.

Code 1940, Tit. 51, §9 reads as follows:

"§9. Exemptions not to apply to taxes to which factories plants, etc., are already subject.—Nothing contained herein shall be held or construed to authorize or empower any court of county commissioners, board of revenue or like governing body of any county in this state, or the governing body of any municipality within this state, or the department of revenue, to exempt from taxation, either as to ad valorem, franchise or capital stock, any plant, factory or other institution herein mentioned, whether a corporation, individual or partnership, where such plant, factory, addition thereto or machinery and equipment therein installed, prior to September 13, 1939, it being the intention of this provision not to exempt any plant, factory or institution herein mentioned from any taxation to which it is now subject." (Emphasis ours.)

Construing the sections or statutes above referred to and quoted, or quoted from, together in pari materia, and in view of their somewhat ambiguous or uncertain language, it is my opinion that the legislative intent to be deduced therefrom was not to exempt from taxation any property in existence and subject to taxation prior to application for the exemption. This conclusion finds support in the well-established rule of construction that statutory

exemptions from taxation must be strictly construed in favor of the taxing authorities. **Brown v. Protective Life Ins. Co.**, 188 Ala. 166, 66 So. 47; **Bowman v. State Tax Comm.** 235 Ala. 190, 178 So. 216; **Henry v. McCormack Bros. Motor Car Co.**, 232 Ala. 196, 167 So. 256.

This conclusion is also fortified, in my opinion, by the recital in the statute itself that it was enacted for the purpose of encouraging the building, extension and operation of factories and plants for the numerous manufacturing purposes enumerated therein and also by the requirement that in order to obtain the exemption the application must be made to the county, city or town, as the case may be, "in which it is **proposed to locate**," the plant or factory to be exempted.

The inference is clear, therefore, that as to all property in existence and subject to taxation at and prior to application for the exemption, such exemption is not authorized, or should be denied.

The result is that no property of the Skyline Industrial Company in existence on or prior to June 17, 1941, when the application for exemption was made, and that time subject to taxation, is entitled to the exemption. Clearly, the erection, construction, equipment and operation of this factory or plant were not induced, encouraged or accomplished by reason of the tax exemption statute. For aught that appears, this improvement would have been accomplished without reference to the potential exemption, inasmuch as no application therefor was made until June 17, 1941, although at the very time of incorporation of the company, on August 4, 1938, the right of exemption was available, had it seen fit to apply therefor, as above indicated.

See also Quarterly Reports, Attorney General, Vol. III, page 169; Biennial Report, Attorney General, 1934-36, page 685.

This office has also held that a house incomplete on October 1, at the beginning of a tax year, together with the materials then and there assembled to complete the house, is subject to taxation for that year at sixty per cent of the aggregate fair market value. Quarterly Reports, Attorney General, Vol. XX, pages 265, 316; Vol. XII, page 14.

No distinction is to be taken between an incomplete "house" in process of completion, and an incomplete industrial plant in like process, so far as I can see, for purposes of taxation,—pretermittting any question of exemption.

Consequently, although the plant of the Skyline Company on September 13, 1939 was incomplete, yet it was subject to taxation at sixty percent of its fair market value on October 1st next thereafter, in the absence at that time, October 1, 1939, of any grant of exemption.

The taxpayer has apparently admitted this by assessing its property for taxes and paying taxes thereon for the tax year 1940, as stated in your letter.

In my opinion the tax exemption statute as to industrial plants cannot be given a retroactive effect and operation, and the grant of exemption in the present instance was not authorized by law.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 28, 1941

Hon. E. G. Pilcher, Chairman,
Board of Commissioners,
Housing Authority of City of Attalla,
Attalla, Alabama.

Housing Authorities—Cooperation between Authorities—

1. Under facts stated, the Housing Authority of the City of Attalla, Alabama, may construct and operate housing projects within the corporate limits of the City of Attalla where consent has been obtained from the Greater Gadsden Housing Authority. (Code 1940, Tit. 25, §14)

2. Resolution of consent examined and held sufficient.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of July 22, 1941, is as follows:

"The Housing Authority of the City of Attalla, Alabama, has been supplied with a copy of your opinion set forth in a letter addressed to the Honorable John Brandon, Secretary of State, dated April 22nd, 1941, referring to the Greater Gadsden Housing Authority and The Housing Authority of the City of Attalla, and we respectfully request that you refer to said opinion for the statement of facts contained therein.

"For the benefit of The Housing Authority of the City of Attalla, Alabama, we respectfully request of you an official opinion answering the following questions:

"1. Under the provisions of Section 14, of Title 25, Code of Alabama, 1940 (Section 11 of Act No. 56 H. 131, approved February 8, 1935, General Acts of 1935, page 126) does the Greater Gadsden Housing Authority have legal authority to give its consent, by appropriation resolution, for The Housing Authority of the City of Attalla to construct and operate housing

projects within the corporate limits of the City of Attalla, Alabama, which said territory lies within the boundaries of the Greater Gadsden Housing Authority—and, with such consent of the Greater Gadsden Housing Authority, will The Housing Authority of the City of Attalla, Alabama have the right and jurisdiction to construct and operate housing projects within the corporate limits of the City of Attalla?

"2. If you answer the above in the affirmative, then will the proposed resolution attached as Exhibit 'A' to this letter, when adopted by the Greater Gadsden Housing Authority, be sufficient to evidence and give the consent of the Greater Gadsden Housing Authority for The Housing Authority of the City of Attalla, Alabama to construct and operate housing projects within the corporate limits of said City of Attalla?"

It seems that your first inquiry has been specifically answered in the affirmative by the opinion rendered to Hon. John Brandon, Secretary of State, under date of April 22, 1941, to which you refer. You will note that it is stated in the Brandon opinion that "the Housing Authority of the City of Attalla, Alabama, does not have the right, * * * to operate in any of the territory which is included within the boundaries of the Greater Gadsden Housing Authority, **except in accordance with the terms of Section 11 of the original act * * *.**"

Section 11 of the original act appears, without material change, in the Code of 1940 as Section 14 of Title 25.

As noted in the Brandon opinion, this section affords specific authority for a housing authority to construct and operate a housing project within the boundaries of any other housing authority where the conditions imposed by Section 14 (Section 11 of the 1935 Act) are met. Since it appears from your letter of inquiry that the conditions prescribed by Section 14 are fully met, you are advised that the Housing Authority of the City of Attalla, Alabama, will have the right and jurisdiction to construct and operate housing projects within the corporate limits of the City of Attalla, upon the adoption of the resolution, in my opinion, is legally sufficient to meet the requirements of Code of 1940, Title 25, Section 14.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 28, 1941

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Judges of Probate—Fees—Corporations—

An amendment of the charter of a private corporation which consists only of changing the corporate name and extending the corporate life does not require the payment of the \$2.50 fee for examining the certificate required by Code, 1940, Title 10, Section 5, or the \$2.50 fee required by Title 10, Section 11.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of June 26, 1941, is as follows:

"There has been filed in this office an amendment or correction of errors petition for incorporation. The substance of the petition made the corporation perpetual and changed its name. There was no increase in the capital stock with the filing of this petition. I have carefully checked Article 2, Title 10, Sections 17 to 21, inclusive, and fail to find proper information concerning the charges to be made by the Judge of Probate for these services. The procedure seems to be the same with the exception of charges made on capital stock.

"I would appreciate your advising me if the following are the proper charges to be collected by the Judge of Probate in such cases, to-wit:

"Examination Fee	\$2.50
Reporting fee to State	2.50
Recording Certificate	.45
Issuing Certificate	1.00
	—
Total	\$6.45"

It is my opinion that you would only be entitled to a recording fee of fifteen cents per one hundred words and the fee of one dollar for the issuing of the amended certificate, if same was actually issued. You would not be entitled to the \$2.50 fee provided for by Code, 1940, Title 10, Section 5, or the \$2.50 fee provided by the Code, 1940, Title 10, Section 11.

The procedure whereby a private corporation may amend its charter in certain respects, including that for changing its corporate name and extending its corporate existence, is provided for by Title 10, Section 18 of the 1940 Code, which is as follows:

"§18. Changes or amendment of charter and scope of business; how affected.—Every corporation chartered under this title or under general or special law of this state may change the nature of its business, the par value of the shares of its stock, change the location of its principal office in this state, renew or extend its corporate existence, change its corporate name, and make such other amendment, alteration, or change of its charter as may be desired in the following manner: The board of directors shall pass a resolution declaring that such change or alteration or extension is desirable and calling a meeting of the stockholders to take action thereon; if the holders of the larger amount in value of each class of stockholders having voting powers shall vote in favor of such alteration, change, amendment, or renewal, or extension, a report thereof, certified by the president or secretary of the corporation, under the corporate seal, must be filed and recorded in the office of the judge of probate of the county in which the corporation was organized, and upon the filing of the same the certificate of incorporation shall be deemed to be so amended, or the corporate existence so renewed or extended; but such certificate of change, alteration, amendment, renewal, or extension, shall contain only such provisions as would be lawful and proper to insert in an original certificate of incorporation, made at the time of making such amendment."

It is apparent from the above quoted section that there is no specific fee there provided for filing such amendments. If the probate judge is entitled to any fee for the filing of such amendment there must be some specific statutory provision allowing this fee to him, as it is well settled that the law of costs and fees is strictly construed, and that a public official is not entitled to a fee unless he can point to a statute specifically authorizing same. **Troup v. Morgan County**, 109 Ala. 162, 19 So. 503; Title 11, Section I, Code of Alabama, 1940.

Let us look, therefore, to Sections 5 and 11, Title 10, Code of Alabama, 1940, which provide for the other fees mentioned in your inquiry. These sections are as follows:

"§5. Certificate of registration, fees for recording.—After it has been recorded that probate judge shall indorse thereon his certificate or registration, showing the book and page where recorded, and for his services for recording the certificate shall receive fifteen cents for each one hundred words of the certificate or incorporation and two dollars and fifty cents for examining the certificate."

"§11. Statement to be filed with secretary of state.—Within ten days after the filing of the certificate in the office of the probate judge as provided, he shall cause to be filed in the office of the secretary of state a statement signed by the probate judge of the county in which the corporation was organized, giving the name of the corporation, the names of its incorporators, the date of its incorporation, the amount of its capital stock, and the amount thereof actually paid in, and the name of the county in which incorporated. And for filing such statement there shall be paid, in advance, to the probate judge, for the use of the state, a fee of two and a half dollars."

Both of these sections refer to the original certificate of incorporation provided for by Code of 1940, Title 10, Section 2, which is required by Code of 1940, Title 10, Section 4, to be filed in the probate office of the county in which the principal office of the corporation is located. There appears in said sections no mention of an amendment of the charter which is provided for by Code of 1940, Title 10, Section 18. Therefore, if the corporation is to be liable for the fees provided for by Sections 5 and 11, supra, the amendment must be such as to actually create a new corporation rather than merely amend the old charter. Of course, a new corporation may be created out of an existing one by an amendment to its charter; however, to accomplish this end there must be a substantial change in the scope, rights, and powers of the corporation. **Commonwealth v. Belknap Hardware Manufacturing Co.**, 206 S. W. 277, 182 Ky. 155.

In the case of **Ohio Valley Tie Company v. Bruner**, 146 S. W. 749, 148 Ky. 358, it was held that an amendment merely extending the corporate life does not create a new corporation or subject a corporation to an organization tax. In the case of **Bruner v. Louisville Packing Company**, 139 S. W. 764, 144 Ky. 471, it was held that an amendment reducing the capital stock and changing the name of the corporation did not create a new corporation.

Therefore, it is my opinion that the amendment in question here which merely changes the name of the corporation and extends the corporate life does not amount to the creation of a new corporation.

In the case of **Lamb v. Dobson**, 90 N. W. 607, 177 Iowa 124, wherein there were statutory provisions requiring the payment of a fee of \$25.00 and a fee of \$1.00 per \$1,000 for all authorized stock in excess of \$10,000 (Section 1610, Code of Iowa, 1897), it was held that an amendment of the charter of the corporation extending the corporate life was sufficient without readopting and refiling the articles in the manner of the original corporation, and that the corporation was not liable for the above mentioned fees upon the filing of the amendment.

Your attention is further directed to Title 2, Section 113, of the Alabama Code of 1940, which specifically provides for a fee for the filing of an amendment in the case of an Incorporated Marketing Association. If the legislature had intended for such a fee to be paid on amendments to the charter of other types of corporations, it is my opinion that it would have specifically so provided.

The authority for the recording fee of fifteen cents per one hundred words and the one dollar fee for each certificate or charter issued to a private corporation is specifically provided for by Title 11, Section 29, of the Alabama Code of 1940.

Therefore, the premises considered, it is my opinion that in the case of an amendment to the charter of a private corporation changing the name of the corporation and extending its corporate existence, the probate judge is entitled to a fee of fifteen cents per one hundred words for recording the

amendment and a fee of one dollar for issuing the amended certificate or charter, if same is actually issued. It is my further opinion that the probate judge is not entitled to the \$2.50 fee provided for by Section 5, supra, or the \$2.50 fee provided for by Section 11, supra, in such case.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 28, 1941.

Hon. M. H. Wilkins,
Tax Collector,
Baldwin County,
Bay Minette, Alabama.

Baldwin County—Tax Assessor and Tax Collector—Commissions—

The two-mill tax levied by the Baldwin County governing body under authority of Act No. 609, H. 1167, approved February 28, 1901 (General & Local Acts, 1900-01, page 1446), is not a "collection for the general fund of the State and county," and the commissions of the tax assessor and tax collector are, therefore, not to be paid on a sliding scale basis, but should be calculated on the two per cent basis provided by the General Acts of 1939, pages 466 and 467 (Code 1940, Tit. 51, §§30 and 191).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion is as follows:

"In 1901 the General Assembly of Alabama passed a law (Local Acts 1900-01, page 1446) as follows:

"Section 1. Be it enacted by the General Assembly of Alabama, that the Court of County Commissioners of Baldwin County be, and it is hereby directed and required to levy and have collected for the year 1901 a special school tax of one-half of a mill, and to increase such one-half of a mill each year thereafter until such special tax reaches two mills per annum, and when said special tax reaches two mills per annum, to levy a special school tax of two mills per annum each year thereafter; provided, that such special tax when added to the assessment for other county purposes shall not exceed the constitutional limit for county taxation; said special tax shall be used only for the support and maintenance of public schools in said county as hereinafter provided.

"Section 2. - - -

"Section 3. Be it further enacted, that it shall be the duty of the tax collector of said county to pay over to the county superintendent of education as herein provided, all school moneys collected by him and on hand for public schools on the first day of November, 1901, and on the first day of each month thereafter, until the same shall have been paid in, showing with each payment what amount is collected from white and what amount from colored tax payers.'

"The Legislature of the State of Alabama, in 1939, passed acts governing the Tax Collector and Tax Assessor's commissions (1939 Acts, pages 466 and 467) providing: ' - - - In counties where collections, not including taxes on real estate bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, do not exceed \$12,000.00, the rate of commission shall be 10% on the first \$5,000.00, 5% on the next \$4,000.00, and 4% on the remainder. The Commission herein provided for is to be **calculated on all collections for the general fund of the State and County.** In counties where the collections, not including taxes on real estate bid in by the State at tax sales and taxes which would be due on property except for the provisions of the present applicable law exempting homesteads from State taxes exceed \$12,000.00, the commissions shall be as above declared up to \$12,000.00, and 1½% on the remainder up to \$15,000.00, and 1% on the remainder above \$15,000.00.'

"The said Acts also provide: ' - - - He shall also be entitled to receive 2% on all collections made by him on special taxes, whether such **special taxes** be levied for the State or County, to be paid out of such special taxes. The Tax Collector (and Tax Assessor) shall receive 2% commissions on all Special County or District taxes levied for school purposes.'

"The County Commission of Baldwin County, Alabama, has annually, for each year, made the following levy: 'BE IT RESOLVED, that there is hereby levied by this County Commission for the year commencing October 1, 1939 and ending September 30, 1940, a **GENERAL TAX** of three (3) mills on each dollar worth of taxable property in Baldwin County, Alabama, and on all other subjects of taxation in the said county as assessed for revenue to the State as shown by Assessment Books for 1939;

"'BE IT FURTHER RESOLVED, that there is hereby levied a tax of two mills on each dollar worth of taxable property, or other subjects of taxation in Baldwin County, Alabama, as the same is assessed for taxes by proper officials for the year commencing October 1, 1939 and ending September 30, 1940, as authorized by an Act of the Legislature of Alabama, approved February 28, 1931, the same to be used exclusively for public school purposes in accordance with said Act, and to be paid over in the manner required by law.'

"I have, in accordance with the Act of the Legislature of Alabama, approved February 28, 1901, been collecting the two mill tax and paying the same over to the Superintendent of Education of Baldwin County, Alabama.

"I will appreciate it, very much, if you will, at your earliest convenience, let me have an official opinion on the following questions:

"1. Is the two mill school tax collected by me, as Tax Collector, part of the collections for the general fund of the State and/or County?

"2. Is the levy made by the County Commission of Baldwin County, Alabama, authorized by the Act of the Legislature of Alabama, approved February 28, 1901, a part of the levy of the County for general purposes?

"3. What commission is the Tax Collector and the Tax Assessor of Baldwin County, Alabama, entitled to on moneys collected on the two mill tax levied by the County Commission of Baldwin County, Alabama, as authorized by the Act of the Legislature of Alabama, approved February 28, 1901, which according to the provisions of said act, is used exclusively for public school purposes, in accordance with said act and is paid over in the manner required by law?"

In an opinion rendered under date of December 6, 1939, to Hon. B. P. Singleton, Chief Examiner of Accounts (Quarterly Report Vol. XVII, page 347), it was held that the two-mill tax levied by Baldwin County for school purposes under Local Acts, 1900-01, page 1446, was to be considered within the five-mill tax levied for general county purposes, and, of consequence, commissions earned thereon should be computed on a sliding scale basis. While reference is made in the opinion to Act No. 325, H. 321, approved August 31, 1939 (General Acts, 1939, page 466), and Act No. 326, H. 322, approved August 31, 1939 (General Acts, 1939, page 467), which acts amended Sections 161 and 22, respectively, of the 1935 Revenue Laws, it does not appear that the full effect of these amendatory acts was given consideration. Accordingly, for the reasons hereinafter set forth, the opinion must be overruled insofar as it concludes that under the 1939 Acts, *supra*, the commissions of the tax assessor and tax collector on the two-mill levy for school purposes are to be computed on the "sliding scale" basis.

In your letter of inquiry you have set forth the pertinent provisions of Act No. 325 and Act No. 326, *supra*. In each of the acts I find that there was inserted, by way of amendment, the following provision:

"The commission herein provided for is to be calculated on all collections for the general fund of the state and county."

The "commission" to which reference is made is the commission calculated on the "sliding scale" basis. It must follow, therefore, that the allowance of 2% on collections of "special taxes" applies with respect to collections of all other taxes than those for the general fund of the state and county. Any other line of reasoning would impel the conclusion that the legislature intended the tax assessor and tax collector to perform services with respect to this tax without compensation. No basis for such a result is to be found in the statutes.

It is apparent, therefore, that the Legislature, by amending Sections 22 and 161 of the 1935 Revenue Law, has specifically defined the taxes, upon

which the tax collector and tax assessor shall be entitled to two per cent commission, as being all taxes other than those collected for the general fund of the state or county. Act No. 325, and Act. No. 326 appear in the Code of 1940, as §§191 and 30 of Tit. 51, respectively.

Since, to determine whether the tax collector and tax assessor are entitled to commissions on a sliding scale or upon a flat two per cent basis it is necessary to determine whether such taxes are collected for the general fund of the state and county, it becomes necessary to consider the character and disposition of the special school tax levied by your county.

The requirement that Baldwin County levy a special school tax is found in Act No. 609, H. 1167, approved February 28, 1901 (General & Local Acts 1900-01, page 1446). The pertinent provisions of this act are quoted in your letter of inquiry, and will not again be set out. Suffice it to say that it is provided by Section 3 of the act that "it shall be the duty of the tax collector of said county to pay over to the county superintendent of education, as herein provided, all school monies collected by him * * * on the first day of each month * * *."

In Section 5 it is provided that the superintendent of education "shall keep the apportionment and disbursement of the county school money separate from the state school funds."

Act No. 609, supra, was considered in the opinion in Vol. XVII, page 347, it there being held that the act was constitutional, valid and now in operation.

It is my opinion that the taxes required to be levied by Act No. 609, supra, will not, when collected, go to the general fund of the state or county. This conclusion seems obvious in view of the specific direction of Act No. 609, supra, that such taxes shall be paid to the county superintendent of education.

Since the collections will not be for the general fund of the state or county, the tax assessor and tax collector should receive a flat two per cent commission thereon, rather than a commission calculated by the "sliding scale" provided for in Act No. 325 and Act No. 326, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 29, 1941.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

**Taxation—Tax Exemptions—Government Property — Executory
Contract of Purchase and Sale of Property of United States.**

1. Property in possession of purchaser under contract between himself and United States, under which purchaser has paid a substantial part of the purchase money and will be entitled to a deed upon payment in full of such purchase money, is subject to taxation as property of such purchaser.

2. Such property should be assessed to such purchaser, and may be sold for payment of taxes so assessed, subject to the right, title, interest and estate of the United States therein held as security for payment of unpaid purchase money.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of March 28, 1941, in which you request my official opinion as follows:

"Sometime last year the U. S. Government asked for bids on the old Birmingham Post Office site, which is described as follows:

"Lots 11-12-13-14 & 15' of Lot 15 blk 87 B'ham

"The old Post Office building had been removed and since that time there has been erected on the site a parking lot with a concrete second floor with no roof. The total price paid by the Ken Realty Company was \$255,000. This being the highest bid, the Government notified the Ken Realty Company by letter that their bid would be accepted.

"The Ken Realty Company then paid approximately \$30,000 in cash and later paid some more—I do not know whether the total amount paid on the purchase price is \$50,000 or \$80,000 but, at any rate, no deed to it has been given the Ken Realty Company and they have been notified by letter that no deed would be given until such time as the full purchase price had been paid. In the meantime, this is the best parking lot in the City of Birmingham and brings in a fine revenue.

"On the 7th of February, 1941, I made an assessment on this property and notified the Ken Realty Company—they, in turn, had their attorney contact me and he claimed that inasmuch as there was no instrument changing the title to the Ken Realty Company that they were not liable for the taxes. * * * I have held the assessment up since the 7th day of February and want to be sure I'm right when I make the assessment; therefore, an early opinion from you will be deeply appreciated."

From the foregoing, it appears that Ken Realty Company is in actual occupation and possession of revenue producing property under an executory contract of sale between itself and the United States; that it has paid \$50,000 or \$80,000 of the \$255,000 purchase money to be paid thereunder; and that upon payment in full of the purchase price it will receive a deed vesting in itself legal title to said property.

In legal contemplation, the taxpayer is the equitable owner of the property, and the vendor, United States, retains legal title as security for payment of unpaid purchase money.

In my judgment, this situation is identical in legal contemplation with that considered in the opinion rendered to you under date of March 22, 1941 (Quarterly Report of Attorney General, Vol. XXII, page 226), as to property purchased by a city to satisfy unpaid improvement assessments, and subsequently sold by it under a so-called "lease-sale contract" providing for conveyance to the lessee-vendee upon payment in full of ten annual installments. That opinion was based upon the case of **Crow, Tax Collector v. Outlaw**, 225 Ala. 656, 145 So. 133, holding that a purchase in possession of property under an executory contract of purchase and sale was liable for ad valorem taxation thereon, although legal title to the property remained in the vendor, the City of Mobile. Without such contract and possession by the purchaser, the property would have been exempt from State ad valorem taxation by virtue of Section 91 of the Constitution of Alabama, 1901, and Section 2(a) of the 1935 Revenue Act, now Code of Alabama, 1940, Title 51, Section 2(a).

In my opinion, it makes no difference that the vendor is the United States rather than a municipality, and that the legal title to the property remained in the United States, though without such contract and possession by the purchaser the property would have been exempt from ad valorem taxation by the State of Alabama because of the constitutional inhibition against the taxation by the states of property of the United States and Section 2(a) of the 1935 Revenue Act, now Code of Alabama, 1940, Title 51, Section 2(a). This, for the reason that, as stated in the opinion of the court in **Crow, Tax Collector v. Outlaw**, supra:

"It is well settled that when the vendee of real property is in possession under an executory contract of sale, he is liable to be taxed as the owner."

See, also, **State v. White Furniture Company**, 206 Ala. 575, 90 So. 896.

In reaching this conclusion, I am not unmindful of the fact that certain federal decisions may be considered to the contrary, as indicated by the case of **Lincoln County v. Pacific Spruce Corporation**, 26 F. (2d) 435 (Circuit Court of Appeals, Ninth Circuit). However, I am disposed to follow the decisions of the Supreme Court of Alabama, cited supra, on this subject, the holdings of certain federal courts to the contrary notwithstanding, in the absence of a holding to the contrary by the Supreme Court of the United States.

Consequently, it is my opinion that the property in question should be assessed for ad valorem taxation to the vendee, the Ken Realty Company. Of course, in the event the taxes so assessed are not paid by the vendee, the Ken Realty Company, the property may be sold for the payment of the taxes so assessed, but subject to the right, title, interest and estate of the United

States therein, held as security for payment of the unpaid purchase money. See *City of New Brunswick et al v. United States of America et al*, 276 U. S. 547, 72 L. ed. 693.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 29, 1941.

Hon. Frank M. Stewart,
Executive Secretary,
Milk Control Board,
Montgomery, Alabama.

Milk Control Board—Records—

Milk Control Board, or any person designated for that purpose by the Board, may inspect books and records of persons, firms or corporations located in a duly and legally designated milk shed, where such books or records pertain to milk purchases, etc., even though such person, firm or corporation is not a licensee of the Board.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of July 25, 1941, is as follows:

"The following inquiry is addressed to you for an opinion at the earliest convenience:

"Does the Alabama State Milk Control Board have the right, power and authority to require a person, firm or corporation, not a licensee of the Board, but located in a duly and legally designated milk shed, to allow the Board to inspect the books and records of such person, firm or corporation, as such books or records pertain to milk purchases."

It is my opinion that your inquiry is answered in the affirmative by the specific language of Code 1940, Title 29, §212. Section 212, as pertinent, is as follows:

"§212. **Entry, inspection and investigation**—The board or any person designated for that purpose by the board, shall have access to, and may enter, at all reasonable hours, all places where milk is produced, stored, bottled, processed, or manufactured, or where milk or milk products are being produced, bought, sold or handled, or where the books, papers, rec-

ords or documents relative to such transactions are kept and shall have the power to inspect and copy the same in any place within the state, and may administer oath and take testimony for the purpose of ascertaining facts, which, in the judgment of the board, are necessary to administer this chapter, but any such information so derived shall be treated as confidential by the board, and shall be used by it only for the administration of this chapter and not for the general public issue. * * * (Emphasis supplied)

There is no requirement in Section 212, supra, that the person, firm or corporation whose books, records, etc., the Board desires to inspect shall be a licensee of the Board. The language employed in Section 212, in my opinion, is an authorization to the Milk Control Board, or any person designated for that purpose by the Board, to inspect and copy books, records, etc., where the same are relative to the transactions named in Section 212, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 30, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Income Tax Deductions—Assessments on Candidates for Office—

Assessment paid by candidate for office in primary election as condition for qualifying as such candidate not deductible from gross income for purpose of computing net taxable income under Code 1940, Title 51, §385(c)(3).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion under date of July 23, 1941, is as follows:

"A certain taxpayer in his income tax return for the year 1940 claims the right to deduct from gross income the amount paid by him to the State Democratic Committee as a qualifying fee assessed by such Committee against candidates desiring to qualify as such in a primary election. The taxpayer claims the right to make such deduction under the provisions of Title 51, Section 385, sub-section (c), authorizing the deduction of taxes paid 'by the authority of any states or territory, except income tax, including the State of Alabama, or of any county, school or district, municipi-

pality or other taxing sub-division of the State of Alabama, except the income tax herein levied; * * *.

"As the question involved will relate to and affect numerous cases, we respectfully request your opinion as to whether such deduction is authorized under the Alabama Income Tax Act."

Section 347, Title 17, Code of 1940, reads in part as follows:

"* * * every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein, or to otherwise participate in such political parties and primaries; and the qualifications of electors entitled to vote in such primary election shall not necessarily be the same as the qualifications for electors entitled to become candidates therein; provided, that nothing herein contained shall be so construed as to prohibit any state executive committee of a party from fixing assessments or such other qualifications, as it may deem necessary, for persons desiring to become candidates for nomination to offices at a primary election, but such assessments shall not exceed two per cent of one year's emolument from all sources, of the office sought,"

It is contended that "the State Committee is a recognized and empowered instrumentality of the State of Alabama, authorized to assess, levy, and collect a tax or assessment for qualifying candidates who apply to qualify to run for office;" and that such executive committee is "an instrumentality of the State," to which the State has delegated the power of taxation with limitations above indicated.

It is, therefore, further contended by the taxpayer in question that any assessment paid by him in order to qualify as a candidate for office in the democratic primary election is deductible, for income tax purposes, from gross income, by virtue of §385, Title 51, Code of 1940, subdivision (c)(3) as a tax paid or accrued by authority of the State or its "instrumentality" or agency. It is conceded that the alleged assessment is not deductible as a business expense under said §385, subdivision (a) and that "running for office is not a business," within the income tax law.

Innumerable definitions of word "tax" are naturally to be found in the books. 41 Words & Phrases (Per. ed) 153. Among them, selected at random, the following would seem to be well considered:

"A tax is an enforced contribution of money or other property, assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state on persons or property within its jurisdiction, for the purpose of defraying the public expenses, and operates in invitum and independent (sic) of the will or contract of the persons taxed, and all proceedings for the levy and collection of a tax show a purpose to tax only persons who can be compelled to pay." **French Republic v. Board of Sup'rs.**, 200 Ky. 18, 252 S. W. 124.

"Tax is enforced contribution of money assessed by authority of sovereign State." **Orange County v. Wilson**, 202 N. C. 424, 163 S. E. 113. "A contribution which the law requires individuals to make for the support of the government." **Dunn v. Winston**, 31 Miss. 135. "An enforced contribution for support of government, administration of law, and execution of various functions of the sovereign." **Klemm v. Davenport**, 100 Fla. 627, 129 So. 904, 70 A.L.R. 156.

Our own Supreme Court defies tax as "an authoritative exaction for the support of the government." **Montgomery County v. City of Montgomery**, 190 Ala. 366, 67 So. 311.

In all the definitions three elements are essential to constitute a tax: (a) the levy or assessment must be made by the sovereign state or its authority, (b) for a public governmental purpose, and (c) payment thereof in involuntary, or in invitum, by the taxpayer. The three essentials must combine to form a tax.

The so-called assessment levied by the executive committee on candidates in the democratic primary, of which payment is required as a condition to their "running for election," or selection as candidates of the party, does not in my opinion meet any of the essential requirements of a tax, and is not therefore deductible as such under the Alabama Income Tax Act.

The contention that the State Democratic Executive Committee is a recognized and empowered instrumentality is answered to the contrary in the case of **Smith v. McQueen**, 232 Ala. 90, 166 So. 788, wherein the following language is found:

"This general principle was recognized by this court in *Lett v. Dennis*, 221 Ala. 432, 129 So. 33, 35, where it was observed that political parties are not governmental agencies, but voluntary organizations with the objects 'intimate to those who compose them.' They have grown in importance and influence, and under our Republican form of government have become, in a sense, a part of our great political system. For many years these organizations were unrestrained in any manner, and suits arose calling for legislative action. While they are still voluntary organizations, yet they are affected with a public interest, and, the authorities generally agree, are subject to regulation by legislative enactment. Our Constitution (section 190), while demanding regulatory statutes as to primary elections, expressly provide against any compulsory primary; and our present statute (Gen. Acts 1931, p. 73) represent a response to such constitutional mandate."

To hold that the said Committee is an agency of the State would jeopardize our entire party system. See **Nixon v. Herndon**, 273 U. S. 536, 71 L. Ed. 759, 47 S. Ct. 446, and **Nixon v. Condon**, 286 U. S. 74, 76 L. Ed. 984, 52 Sup. Ct. 484.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 30, 1941.

Hon. C. S. Hinton,
Tax Collector,
Tuscaloosa County,
Tuscaloosa, Alabama.

Constitutional Law—Local Acts—

Averment in proof of publication required by Section 106 of the Constitution of Alabama of 1901 that notice was published "in the Tuscaloosa News" without stating that such was a daily newspaper published in Tuscaloosa County held sufficient compliance therewith.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of July 22, 1941, in which you request my official opinion as follows:

"I respectfully request your opinion with reference to the constitutionality of Act No. 71, H. 192, approved March 31, 1936, Local Acts, 1936, p. 39.

"The proof of publication shown by the Journals of the House and Senate at pages 192, 206, respectively, is as follows:

"I hereby certify that the attached notice was published in the Tuscaloosa News once a week for four consecutive weeks; viz, February 4, 11, 18, 25, 1936. Feb. 4-11-18-25-4tc.

Bruce Shelton,
Publisher.

"Subscribed and sworn to before me on this the 26th day of February, 1936.

Lilla Collins,
Notary Public.'

“(Seal)

"Please advise me if the above quoted proof of notice constitutes a sufficient compliance with the requirements of Section 106 of the Constitution of Alabama, 1901."

Section 106 of the Constitution of Alabama, 1901, is as follows:

"Section 106. No special, private or local law shall be passed on any subject not enumerated in section 104 of this constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the State, in

the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law, and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties, or if there is no newspaper published therein, then by posting the said notice for four consecutive weeks at five different places in the county or counties prior to the introduction of the bill; and proof by affidavit that said notice has been given shall be exhibited to each house of the legislature, and said proof spread upon the journal. The courts shall pronounce void every special, private or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section."

An examination of the journals of the Legislature (House Journal of Alabama, 1936, page 192, and Senate Journal, 1936, page 206) shows proof by affidavit that notice of Act No. 71, supra, was given and exhibited to each House, said proof being spread upon the journals as required by Section 106 of the Constitution. The question presented is whether the recital by affidavit of publication as shown by the journals is sufficient since the courts are confined to the journals for notice and proof of the same. **Sellers v. State**, 162 Ala. 35, 50 So. 340; **Larkins v. Simmons**, 155 Ala. 273, 46 So. 451; **Longshore v. State**, 200 Ala. 267, 76 So. 33.

The proof of publication shows that the "notice was published in the Tuscaloosa News once a week for four consecutive weeks; viz: Feb. 4, 11, 18, 25, 1936. Feb. 4-11-18-25-4tc. Bruce Shelton Publisher."

Under the Constitution of Alabama, 1875, Article IV, Section 24, with respect to notice required thereunder for local or special laws, the courts adopted a rather liberal view, holding that:

"* * * when the Constitution does not require the journals to affirmatively show that a particular thing, necessary to the validity of the legislative action, was done, mere silence will not invalidate, and in such case we will presume that the legislators observed their obligation, and did not pass such bill without sufficient proof that the proper notice had been given. * * *." **Hall v. Steele**, 82 Ala. 562, 2 So. 650. See also **Keene v. Jefferson County**, 135 Ala. 465, 33 So. 435.

Section 106, Constitution of 1901, abrogated the holdings of the above cases in this respect and imposed upon the courts the duty to "pronounce void every special, private or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section."

One of the first constructions of Section 106 in the case of **Kumpe, Judge, etc. v. Irwin**, 140 Ala. 460, 36 So. 1024. The notice in question was an affidavit which appeared in the journals as follows:

"The State of Alabama, Lawrence county. Before me D. Lowe, a notary public in and for said county personally appeared Jourd White, who, after being duly sworn, says he is the editor and publisher of the Moulton Advertiser, a newspaper published at Moulton, in Lawrence county, Alabama, and that the notice herewith attached has been pub-

lished once a week. This August 29, 1903. (Signed) Jourd White. R. Lowe, Notary Public."

In this case the Court held:

"It will be observed, that this affidavit stated no more than that Mr. White was editor and publisher of the Moulton Advertiser, a newspaper published in Lawrence County, and that the notice referred to has been published once a week. It fails to show that the notice was published in the Moulton Advertiser, a newspaper published in Lawrence county, or that was published 'once a week for four consecutive weeks' in any paper. It shows no sufficient compliance with the mandatory provisions of the constitution. The Journals do not affirmatively show that the act was passed in accordance with the provisions of said section, in which case, the courts are required, without any discretion, to pronounce the act to be void."

Larkins vs. Simmons, cited *supra*.

The policy of strict construction, viz: that every requirement of Section 106 of the Constitution must not only be affirmatively shown but that all matter of affirmation must be expressed in particularity, so laid down was adhered to in **Ex Parte Kelly**, 153 Ala. 668, 45 So. 290, and **Sellers vs. State**, 162 Ala. 35, 50 So. 340.

In the case of **Byrd et al. vs. State Ex rel. Colquett, et al.**, 212 Ala. 266 102 So. 223, very analogous to the present inquiry, a more liberal rule of construction was followed, which may be briefly stated:

"A statute will be sustained as not violative of constitutional limitations on legislative power, if with the aid of all reasonable intendments it can be given effect without violation of the letter and spirit of the Constitution."

The affidavit of publication under attach in this case was:

"State of Alabama, Crenshaw County.

"Before me, a notary public in and for the county and state aforesaid, personally appeared J. C. McLendon, editor and published of the Luverne Journal, a paper published in Luverne, Crenshaw county, Alabama, who being duly sworn, deposes and saith, that the above-attached copy of a _____ was published in the Luverne Journal for four (4) consecutive issues from the 21st day of June to the 12th day of July inclusive. J. C. McLendon.

"Sworn to and subscribed before _____ this July 28, 1923.

"W. Bayzor Martin, Notary Public."

Mr. Justice Bouldin, in the opinion of the Court, state the question of sufficiency of the notice thus:

"Do the words 'Luverne Journal, a paper published at Luverne,' import a newspaper?"

"It is common knowledge that nowadays there are many 'papers published' which are not newspapers in the sense meant in the Constitution. The aim is to bring knowledge of the proposed law to the body of the people of the county through a medium usually carrying the news of public affairs—a newspaper. The sufficiency of this notice appears to turn on whether we can take judicial notice that the Luverne Journal published as stated, is a weekly newspaper."

After a thorough review of authorities, he arrived at this conclusion:

"Applying the principle underlying the rule given by the above authorities, it is manifest the entire people of the state would not have common knowledge of each county newspaper published therein. It is equally clear that the people of a county would have general knowledge of their own county newspaper. Section 106 of the Constitution, which we are considering, adopts the local newspaper as the medium of bringing to the people of the county notice of proposed local laws. Few facts are better known, or more easy of verification by a court, than the existence of a newspaper within its zone of general circulation.

"We conclude this court shall take notice that the Luverne Journal is a weekly newspaper, and so hold the notice sufficient."

It is my opinion that the notice of publication under consideration sufficiently complies with the requirement of Section 106, Constitution of Alabama, 1901. The statement that "the notice was published in the Tuscaloosa News," is sufficient proof to the Legislature and the courts that the Tuscaloosa News is a daily newspaper published in Tuscaloosa County, this being a matter of common knowledge and a fact so capable of verification as not to impose on the Legislature or the courts the cognizance of a fact that is not within the knowledge of most men.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 31, 1941.

Hon. William F. Maynor,
Superintendent of Education,
Blount County,
Oneonta, Alabama.

Schools—County Boards of Education—Attendance Officers—

It is mandatory for a county board of education to appoint an attendance officer, or attendance officers, in accordance with the provisions of Code, 1940, Title 52, Section 314.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 23, 1941, in which you request my opinion as follows:

"Referring to Section 95 of the recent School Code under Title 52, Paragraph 95, relative to compulsory school attendance, permit me to state that I am enclosing a copy of this letter to each of you gentlemen who are interested in complying with the law.

"I am asking an interpretation of this section of the school law with reference to the enforcement of school attendance where the county board of education has tied on the question, two members for and two against, and the president of the county board untied it against employing an attendance worker.

"It seems to me that this section is mandatory and cannot be treated lightly, therefore, I am asking a decision of the Attorney General through the State Department of Education as to what I must do with reference to the matter.

"At our last board meeting, there were three members in favor of employing an attendance worker, but someone informed one member of those three who were for it that it was only a waste of \$2,000 and that we did not have to employ this worker. Therefore, I am asking this decision at once because our board will be in session again on the 29th instanter."

By your letter I presume you wish to be advised as to whether or not it is mandatory that a county board of education appoint an attendance officer or attendance officers. Such inquiry should be answered in the affirmative, subject to the provisions of Code of 1940, Title 52, Section 314.

Code 1940, Title 52, Section 95, provides as follows:

"§95. **Compulsory school attendance districts.**—The county board of education shall, upon the recommendation of the county superintendent of education, arrange the county into one or more appropriate and convenient compulsory school attendance districts; shall keep full and complete records of the boundaries thereof, and shall see to it that the compulsory attendance law is enforced."

Chapter 11 (Sections 297-321) of said Title 52 of the Code of 1940 provides for school attendance. In said chapter various and sundry mandatory duties are imposed on the school officials of the county, including attendance officers. Section 314 provides for the appointment of such attendance officers, and is as follows:

"§314. **Attendance districts.**—The county board of education shall arrange the county, exclusive of cities, into one or more attendance

districts, and said board shall appoint an attendance officer for every district created, who shall hold his office at the will of the county board of education, and the board of education of each city having a city board of education shall appoint one or more attendance officers to serve at the pleasure of the appointing board. City and county boards of education, boards of revenue and courts of county commissioners may jointly employ any such person or persons to carry out the provisions of this chapter and such additional duties as may be assigned them by such boards or governing bodies."

The word "shall" as used in the above quoted section is, in my opinion, mandatory in view of the various mandatory duties imposed upon attendance officers.

Under said section there may be one attendance district for the entire county and one attendance officer appointed. On the other hand, the county may be divided into as many attendance districts as the county board may determine, and an attendance officer appointed for each of such districts. An administrative practice followed in some counties is to make each school a separate attendance district and the principal of each of said schools is appointed as the attendance officer for his respective district.

The premises considered, it is my opinion that it is mandatory on a county board of education to appoint an attendance officer, or attendance officers, as the case may be, under the provisions of Section 314, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 31, 1941.

Hon. W. A. Prestridge,
Sheriff, Cleburne County,
Heflin, Alabama.

Sheriffs—Costs and Fees—Intoxicating Liquors—

Sheriff is not entitled to fee provided by Title 29, Section 129, Code 1940, where defendant is indicted and convicted for distilling.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated July 25, 1941 follows:

"Will you please give me an opinion on the following?"

"I arrested a man working at a whiskey still and at the time of the arrest he had already run over 30 gallons of whiskey which I seized. He was indicted for distilling, pleaded guilty and was allowed probation, provided he paid the costs.

"He has paid the informer's fee as provided in Code 1941, Tit. 29, Art. 102. Would I not also be entitled to the fee of \$10.00 as provided in Tit. 29, Art. 129, since the order of probation provided that the defendant should pay all costs accruing to the officers."

My answer to your inquiry is in the negative.

Title 29, Section 129, Code of Alabama, 1940, provides in pertinent part as follows:

"§129. Fees to be taxed for arrest and seizures in prohibition cases.—When an officer arrests any person in **possession of** an unlawful quantity or quantities of prohibited liquors, or of such liquors under conditions prohibited by law, then **on the conviction of such party of a violation of a city ordinance or state law**, whether in the recorder's court, or state court possessing jurisdiction, a fee for making the seizure of the liquors shall be taxed up against the defendant, and paid to such officer as a part of the cost as follows:" (Emphasis supplied)

It will be noted from the above quoted section that the defendant must be convicted of violating a city ordinance or a state law. This, in my opinion, means that the defendant must be convicted of violating a city ordinance or state law for unlawfully possessing liquors, and if the defendant is convicted for any other crime than the unlawful possession of liquors, it is my opinion that a sheriff would not be entitled to the fees provided for in Section 129, *supra*. Cf. Quarterly Reports, Attorney General, Vol. XVI, page 226, Vol. XVII, page 138.

Therefore, since it definitely appears from your request that the defendant in question was indicted for, and convicted of distilling, and there was no charge against him for possessing illegal whiskey, you are advised that, in my opinion, you are not entitled to the fee of \$10 as provided by Section 129, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 31, 1941.

Hon. J. H. Green,
Clerk, Circuit Court,
Morgan County,
Decatur, Alabama.

Witness—Convict—

1. Convict serving penitentiary term, other than for life imprisonment, entitled to witness fee for appearing as witness in criminal case.
2. Convict serving term of life imprisonment is civilly dead and not entitled to witness fee for testifying in criminal case.
3. Such convicts not entitled to mileage.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of July 1, 1941, is as follows:

"We are now having a term of Criminal Circuit Court. There were some witnesses for the State that were serving terms in the penitentiary. They were brought here in the State Transfer truck and kept in the jail to be used as witnesses for the State. Would they be entitled to claim their attendance as witnesses and mileage?"

At common law, conviction of a treason or other felony placed the convict in a state of attainder, which amounted to forfeiture of estate, corruption of blood and civil death.—18 C. J. S., Convicts, Section 2. However, in accordance with the modern policy of a more humane administration of prisoners, all these early doctrines of common law in regard to corruption of blood, forfeiture of estate and civil death have been entirely done away with, or greatly modified. 18 C. J. S., Convicts, Section 3. In Alabama we have a constitutional provision which provides that "no conviction shall work corruption of blood or forfeiture of estate." Section 19, Alabama Constitution of 1901.

Civil death has also been done away with in Alabama, except in the case of a life sentence. *Holmes v. King*, 216 Ala. 412, 113 So. 274. However, in the case of a life sentence, the convict is, in accordance with Title 61, Section 3, Alabama Code of 1940, civilly dead.

So, in Alabama a convict, other than one serving a life sentence, is not civilly dead, his estate is not forfeited, his right to hold and dispose of property as other citizens is not affected, and there is no apparent reason why he is not entitled to receive a witness fee. 18 C. J. S., Convicts, Section 5.

In regard to a convict serving a term of life imprisonment, the situation is different, however. Title 61, Section 3, of the Code of Alabama, 1940, provides of follows:

"§3. Effect of sentence of imprisonment for life.—A convict sentenced to imprisonment for life is regarded as civilly dead, but may, nevertheless, at any time within six months after his sentence, make and publish his last will and testament."

This section has been construed several times by our Supreme Court.

In the case of **Quick v. Western Railway of Alabama**, 207 Ala. 376, 92 So. 603, it was held that Title 61, Section 3 of the 1940 Code (which was then Section 7637 of the 1907 Code) was not obnoxious to Section 19 of the 1901 Constitution, and that one who was civilly dead lost all of his civil rights, including the right to sue, and, as to these rights, was considered dead.

In **Holmes v. King**, *supra*, the Court, in construing Title 61, Section 3 (then Sections 5293 of the 1923 Code), said:

"We hold that as to property of a life convict, the term 'civilly dead' has the effect the words import; that a life sentence is given the effect of entry into religious orders or banishment at common law; * * *"

In the case of **In re Erskine** (C. C. A. Ind.), 1 Fed. 2d. 149, it was held:

"The 'civil death' spoken of in the books, is of two kinds: (1) Where there is a total extinction of the civil rights and relations of the party, so that he can neither take nor hold property, and his heirs succeed to his estate in the same manner as if he were really dead, or the estate is forfeited to the crown. (2) Where there is an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate to the crown. Of the first kind, are the cases of monks professed, and adjuration of the realm; all the other cases are of the second kind."

Therefore, in view of the position taken by our Supreme Court in the case of **Holmes v. King**, *supra*, a convict sentenced to life imprisonment in Alabama falls within the first classification, and such a person, not being able to take or hold property, would not, in my opinion be entitled to a witness fee for appearing in a criminal case.

In regard to the question of whether or not such convicts are entitled to mileage, allow me to call your attention to Title 45, Section 61, of the Alabama Code of 1940, which provides the method for obtaining the testimony of a convict in a criminal prosecution. This section is as follows:

"§61. Testimony for state in criminal cases.—The presiding judge of any circuit court having reason to believe that the testimony of any convict serving a sentence in the penitentiary, or to hard labor for the county, is necessary in any criminal prosecution for the state, and that other evidence cannot be obtained on behalf of the state, may order a writ to be issued by the clerk, commanding the director to have the convict be-

fore the court, on a specified day, to give testimony in the particular case for the state; and the director must have the convict before the court on a specified day, according to the mandate of the writ, employing a trustworthy deputy, with a sufficient guard, to convey such convict to the court; and after he has testified, the convict must be forthwith returned to the custody from whence he was brought, but notice must be served on the director at least one week before the day appointed to have the witness in court."

I also call your attention to Section 62 of Title 45, which provides for the payment of the expenses incurred in transporting a convict to court to appear as a witness. This section is as follows:

"§62. Fees, guards, escapes, etc., on such removal; receipt of prisoner by sheriff.—For conveying any convict under the provisions of the preceding section, the department is entitled to the actual expenses incurred in such removal, including the hire of necessary guards and their expenses; the guards and the convict are subject to the same liabilities and penalties for an escape, or attempt to escape; the sheriff or jailer of the county must, on demand of the officer having charge of the convict, receive and safely keep such convict in the county jail during his attendance on the court, or while delayed in passing through the county, and is entitled to the usual legal charge for feeding prisoners."

It is a well settled rule of statutory construction that special provisions relating to specific subjects control general provisions relating to general subjects, and things specifically treated will be considered as exceptions to general provisions. *Herring v. Griffin*, 211 Ala. 225, 100 So. 202; *Alabama Digest*, Statutes, Key No. 225½.

Therefore, it is my opinion that Section 62 of Title 45 provides the method for the payment of transportation of convicts to court as witnesses, to the exclusion of Title 11, Section 103, which provides that witnesses are entitled to 5c per mile.

The unquestionable purpose for allowing a witness mileage is to take care of the expense that he must necessarily incur in traveling and from court. In the case of a convict who is transported to and from court by the Department of Corrections and Institutions, at no expense to himself, the reason for the payment of mileage to that convict individually is absent. To hold that such a convict is entitled to mileage would be to say that both the Department of Corrections and Institutions and the convict should be paid the expenses of the same trip. Certainly, this would not be a sound conclusion.

Therefore, it is my opinion that the convict who is transported to court and back by the Department of Corrections and Institutions to appear as a witness in a criminal prosecution is not entitled to mileage.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 31, 1941.

Hon. Riley Green,
Clerk and Register,
Circuit Court,
Pike County,
Troy, Alabama.

Registers—Final Record—

Where a register takes office and finds that final records in certain cases have not been completed, it is his duty to complete them, and if his predecessor has already collected the fees allowed for such services the register has a valid claim against such predecessor for fees so collected.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of July 23, 1941, is as follows:

“RE: Fees for final record in Equity Cases:

“I wish to request your official opinion, as Register of the Circuit Court of Pike County, Alabama, in Equity, on the following:

“On the 18th day of January, 1941, in the case of S. E. Gellerstedt, et als vs. Town of Brundidge, et als, which was then pending in the Circuit Court of Pike County, Alabama, in Equity, and which case is still pending, my predecessor in office collected the sum of \$37.50 for making a final record of the papers in said cause, which represented a partial payment of costs, which had accrued to July 28th, 1939, in this cause. My predecessor did not make the final record prior to the time which his term of office expired. I am required by law to make this final record when the cause is disposed of, and I would like to know if my predecessor in office should not pay over to me said sum of \$37.50 to be used by me if I make the final record, or in case I do not make it, to be turned over to my successor in office, whose duty it will be to make the final record in this case.”

From the facts set out in your letter of inquiry, I assume that the Judge of the Circuit Court of Pike County, in Equity, apportioned the costs in the case of **S. E. Gellerstedt, et als v. Town of Brundidge, et als**, in accordance with the terms of Equity Rule 112, which rule is as follows:

“Costs. Costs will be imposed by the court or judge having jurisdiction at such times during the litigation as he deems proper, subject to correction for improper exercise of his discretion, and may be apportioned by him between the parties; and in all cases where costs are decreed against any party who has given security for costs, execution may issue against such security.” (Appendix, Title 7, Code of 1940)

I do not believe that the fact that your predecessor in office has collected fees for the making of a final record, which service he did not perform, will relieve you of the duty of making such final record when the case is finally disposed of.

Cf. *State v. Johnson* (Minn.), 126 N. W. 479, 481;

State v. Brooks-Scanlon Lumber Co. (Minn.), 142 N. W. 717, 720.

However, I am of the opinion that your predecessor in office was not entitled to convert to his own use the fees which were paid by the parties litigant for the making of a final record, inasmuch as he has performed no service.

It is my opinion that you should attempt to recover from him the money which he kept as fees for making the final record in this case and that if you are successful in recovering this money, it should be paid to you or your successor in office, depending on who performs the service.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 31, 1941.

Hon. W. P. Tartt, Register,
Circuit Court, Sumter County,
Livingston, Alabama.

Costs and Fees—Fine and Forfeiture Fund—Liquor Nuisances—

No authority to collect costs and fees in liquor nuisance cases from the Fine and Forfeiture Fund in the absence of an order of the Judge so requiring the payment of said costs and fees.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of June 14, 1941, in which you request my official opinion as follows:

"A bill of complaint was filed in February, 1938, before I was appointed to this office. J. F. Aldrich as Solicitor for the State v. Clyde Matheney & Mrs. H. E. Stephens. Copy of the petition was given the former sheriff who is not here now and no papers were returned with notations upon same as to whether served or not. On November 21, 1939 the Judge dismissed the case. I have a faint recollection that the County Solicitor told me to file my bill for costs with the Board of Revenue which

I did and collected \$6.80. This case was for the closing up of the premises of the respondents, as they were operating what was known as Tip-Top-Inn, selling whiskey and keeping a rather rowdy place.

"I was told that when the sheriff went there they had moved and nothing left in the premises and I presume the sheriff thought he would finally locate them, but did not.

"Did I have the right to make collection? The State Examiners have recently been here and claim the board had no right to pay same and if I am in error, I desire to reimburse the County Treasurer for this amount. If an execution was issued it was returned with notation 'no property found' for the only papers I find are the petition and the judge's order to close the place up with pad-lock."

In reply, I wish to advise that in my judgment you are not entitled to such costs, in the absence of a compliance with the provisions of Section 152, Title 29, Code 1940.

I gather from your request that the nuisance complained of is a liquor nuisance, since you state that "they were operating what is known as Tip-Top-Inn, selling whiskey and keeping a rather rowdy place."

I wish to refer you to Section 152 of Title 29 of the Code of 1940, which title relates to the abatement of liquor nuisances.

Said section is as follows:

"§152. Fees and allowances to officers making seizures, when and how paid.—There shall be allowed the officer making the seizure under such writ in an injunction case the sum of three dollars and the sum of ten cents for every mile traveled in making the seizure, together with such reasonable sum as the court may deem just for necessary expenses incurred in transporting and providing storage for liquors and beverages and other movable property seized; all which costs shall be taxed in the bill of costs, and if not collected from a defendant, then shall be taxed and paid in criminal prosecutions in which the state fails; and the costs in such injunction case, unless charged against some party defendant by the court and collected from him, shall be paid as in criminal cases in which the state fails, upon the court making an order to that effect."

You will note that the costs here considered are paid as in other cases in which the State fails, upon the Court making an order to that effect. This would necessarily place these costs against the county fine and forfeiture fund if the order of the Court so assessing the costs appeared of record. See Biennial Report of Attorney General, 1936-1938, page 6; Quarterly Report of Attorney General, Volume XIV, page 314.

You state in your request, however, that no order of the Judge so assessing these costs appears of record. It is, therefore, my opinion that no au-

thority for the payment of the costs exists, and that you cannot legally receive them from the fine and forfeiture fund of your county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 31, 1941.

Hon. H. G. Beaird,
Road and Bridge Commissioner,
Cullman County,
Cullman, Alabama.

Cullman County—Road and Bridge Commissioner—Clerk—

1. No authority to pay clerk of County Road and Bridge Commissioner of Cullman County additional amount as custodian of warehouse, unless added duties not now contemplated by law are given him.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion bearing date of June 11, 1941 is as follows:

"Under Local Act No. 152, dated February, 1939, creating the Office of Road and Bridge Commissioner of Cullman County, it was stated that the Commissioner shall employ a clerk at a salary of not more than \$100.00 per month. In my case now, our warehouse and shop adjoins my office and is not under the care and custody of the clerk, but it is my desire to place same under the care of the clerk, and to pay him an additional \$25.00 per month for assuming these added duties.

"Will you please let me know at your earliest convenience if it will be legal for me to employ this clerk as 'Warehouse custodian' showing him on a separate payroll and pay him same out of the Road & Bridge funds?"

I must answer your inquiry conditionally. In my opinion, the answer depends upon facts which are not available to me from your letter.

Section 3 of Act No. 30, H. 152, approved February 15, 1939 Local Acts, 1939, page 13, is the provision of law relating to the duties and compensation of the Clerk of the Road and Bridge Commissioner of Cullman County, and in words and figures as follows:

"Section Three: Said Road and Bridge Commissioner of Cullman County, Alabama, is hereby authorized and directed to employ a compe-

tent clerk at a salary of not more than One Hundred Dollars per month to be paid monthly on the first day of each month by warrant drawn by said Road and Bridge Commissioner of Cullman County, Alabama. Said clerk shall have charge of all records, having reference to receipt and payment of money and shall keep a true and correct record of the same and shall keep county records and correspondence as will be necessary to provide for a complete record of all transactions concerning the establishing, construction and maintenance of the roads and bridges of Cullman County, Alabama, and said records shall be open to public inspection during office hours from eight a.m. until five p.m. each day except Sunday."

It is my opinion that if the designation of the Clerk as Custodian of the warehouse is merely an effort to increase the compensation of the Clerk over and above the maximum amount provided in the above quoted section, without, the requirement that he perform duties not incident to his position as Clerk of the said Road and Bridge Commissioner, such increased compensation would be without authority of law.

On the other hand, if the duties which the Clerk is required to perform as Custodian of the warehouse are entirely different from the duties which are incident to his position as Clerk, then it is my opinion that he may receive compensation for the performance of such services, even though his total compensation would exceed the maximum of \$100 per month, provided for in Section 3 of the above cited local act.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 31, 1941

Hon. D. C. Nix,
Sheriff, Franklin County,
Russellville, Alabama.

Uniform Firearms Act—Pistol Not Contraband—Statutes—

1. Pistol taken from defendant, and used as evidence on trial, should be returned to defendant. Where defendant is sentenced to life imprisonment, and is civilly dead, the pistol should be delivered to his heirs subject to administration of his estate.

2. Title 14, §163, Alabama Code of 1940, in full force and effect—not unlawful to carry unconcealed pistol on public property without license, except in vehicle.

3. Recodification of repealed statute discussed.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of May 24, 1941, in which you request my official opinion as follows:

"A owns a pistol and carries it on his person without a license as required by law. A kills B with the pistol. No pistol case is made against A, but A is given a life sentence for Murder. The sheriff goes to the scene of the killing and takes charge of the pistol and the sheriff retains possession of the pistol for evidence in the case. After the murder trial is over, what should the sheriff do with the pistol? Should the Sheriff keep the pistol or should he as sheriff deliver the pistol to A or his relatives or friends? Is it legal for the sheriff to deliver this pistol to the attorney for A? If A directs that the sheriff deliver the pistol to some certain person, after the trial is over, should be sheriff do so? Can the sheriff keep this pistol as contraband property?

"X is arrested by the Sheriff of the County with a concealed pistol on his person and X is arrested and a case is made against him for carrying a pistol without a license as required by law. The Sheriff of the County takes charge of the pistol and retains the pistol as evidence in the case. After the trial in the pistol case is over what should the sheriff do with the pistol? Should the sheriff retain this pistol or should the sheriff deliver this pistol back to X after the trial is over? If the pistol is delivered back to X and X goes to leave the courthouse with the pistol without a license does X violate the state law?"

In answer to your first inquiry, I call your attention to an opinion of this office to Hon. Burr R. Reeves, Sheriff, Pike County, under date of November 3, 1936 (Quarterly Report of Attorney General, Volume V, page 70), wherein it is stated that "in the absence of statutory provisions, forfeiture or confiscation of firearms taken from persons violating the law relative thereto is not authorized. 68 Corpus Juris 71, Article 85."

In my opinion, you may not retain the pistol as contraband property.

It is my opinion that inasmuch as "A" was convicted of murder in the first degree and his punishment fixed at life imprisonment, he is, therefore, civilly dead and the pistol should be delivered to his heirs subject to administration of his estate, in the absence of a will made by him within six months after his conviction. Section 3, Title 61, **Code of Alabama, 1940**, **Holmes v. King**, 216 Ala. 412, 113 So. 274.

The above answers the first part of your second question.

In answer to the last part of your second question, I call your attention to Section 163 of Title 14 of the 1940 Code, which provides as follows:

"§163. Carrying pistol on premises not his own; who may carry pistol.—Except as otherwise provided in this chapter no person shall carry a pistol about his person on premises not his own or under his control;

but this section shall not apply to any sheriff or his deputy or police officer of an incorporated town or city in the lawful discharge of the duties of his office, or United States marshal or their deputies, rural free delivery mail carriers in the discharge of their duties as such, bonded constables in the discharge of their duties as such, conductors, railway mail clerks, and express messengers in the discharge of their duties."

In the case of **Stinson v. State**, 28 Ala. App. 559, 190 So. 303, Section 3487 of the Code of Alabama, 1923, the predecessor of the above quoted section, was held to be repealed by the Uniform Firearms Act, Act No. 82, S. 63, approved April 6, 1936 (General Acts, 1936, page 51). Attention was called to Section 22 of the Uniform Firearms Act which stated that the Uniform Firearms Act was an entire revision of the subject matter contained therein, and the Court held that Section 3487 of the 1923 Code was repealed by the Uniform Firearms Act.

However, in the 1940 Code, Section 3487 of the 1923 Code appears in the same chapter with the Uniform Firearms Act, with these added words: "except as otherwise provided in this chapter." The addition of these words, together with the fact that this section is codified in the same chapter with the Uniform Firearms Act, in my opinion, shows that the Legislature intended to reenact this section and to give it a field of operation.

While the addition of new words in a revision of a statute does not necessarily alter the construction of the former statute, it will be construed to do so if the legislative purpose to make a change appears. **Ex Parte Lawler**, 185 Ala. 429, 64 So. 102.

Sections of the Code dealing with the same subject matter should be read together, and apparent conflicts harmonized, if possible. **Hunt v. Hunt**, 172 Miss. 732 161 So. 119.

The doctrine of implied legislative adoption of construction of statute by subsequent recodification thereof without change cannot strike down express legislative act to the contrary. **Hart v. State ex rel. Baker**, 228 Ala. 517, 154 So. 77.

The fact that Section 3487, Code of 1923, was amended by the Code Committee by the addition of the words "except as otherwise provided in this chapter," and that Section 22 of the Uniform Firearms Act was not included in the codification of this act, and that section 3487, Code of 1923, *supra*, is codified in the same chapter of the new Code with those sections of the Uniform Firearms Act which are included in the Code constrains me to hold that Section 163 of Title 14 (Section 3487, Code of 1923, as amended) is in full force and effect.

The Supreme Court, in the case of **Isiah v. State**, 176 Ala. 27, 58 So. 53, in construing the predecessor of Section 163 of Title 14, held that this section prohibited the carrying of an unconcealed pistol **only** on the premises of another, and was not a prohibition against carrying an unconcealed pistol on a public highway or other public property. 73 A. L. R. 842. Section 175 of Title 14 prohibits the carrying of a pistol in a vehicle or concealed on or about one's person except in his place of abode or fixed place of business.

Therefore, it is my opinion that "X" would not be violating any law if he takes the pistol in the courthouse without a license, as the courthouse is public property, provided he does not conceal it. Upon leaving the courthouse, he would still not be violating any law as long as he kept the pistol unconcealed, out of a vehicle, and on public property.

If he concealed it, placed it in a vehicle, or went upon the premises of another, which was not under his care or control, he would be violating the law unless he had a license.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 1, 1941.

Hon. W. H. Quillen, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Justices of the Peace—Fines and Forfeitures—Costs and Fees—

Justice of the Peace authorized to collect his fees in public drunkenness case, when the defendant has been proven insolvent by return of execution "no property found," from other fines and forfeitures collected by him.

Fine and Forfeiture Fund—

Fees of Justice of the Peace in public drunkenness case, when defendant has been proven insolvent by proper return of execution "no property found" held not collectible from the Fine and Forfeiture Fund of the County.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter of July 9, 1941, in which you request my official opinion, is as follows:

"A defendant is charged with a misdemeanor of Public Drunkenness by a legal affidavit being made before a Justice of the Peace and a legal warrant of arrest being issued thereon by such Justice of the Peace. The justice of the peace has final jurisdiction of said case in that he can try and fine such defendant on said charge, if he is guilty thereof. The defendant pleads guilty before said justice of the peace to the offense of public drunkenness and the justice of the peace fixes his fine at

\$5.00 and costs as a punishment for said offense. The defendant presently fails to pay or confess judgment for said fine and costs. Thereupon, the justice of the peace sentences said defendant to imprisonment in the county jail for ten days to pay said fine. The justice of the peace renders judgment against said defendant for all court costs and orders execution to issue against the defendant for the court costs. Said execution is issued by the Justice of the Peace for the court costs and placed in the hands of the sheriff of the county and the sheriff of the county finds that said defendant is insolvent and has no property to levy on. Thereupon the Sheriff returns the execution to the Justice of the Peace court endorsed 'no property of the defendant found.'

"Can the Justice of the Peace collect the court costs in the said public drunkenness case out of the fine and forfeiture fund of the county by filing a proper claim?"

"Can the Justice of the Peace collect the court costs in said case out of other fines collected by said Justice of the Peace in other criminal cases?"

"How can said justice of the peace collect the court costs in said public drunkenness case?"

In reply, I wish to advise that the Code of 1940, Title 13, Section 418, provides in pertinent part as follows:

"§418. Required to keep docket and exhibit it to grand jury; other duties.—It is the duty of every justice of the peace and notary public having and exercising the jurisdiction of justices of the peace:

* * *

"To collect all fines imposed where the defendant is not sentenced to jail or hard labor to pay same; or an appeal is taken. He may deduct from fines and forfeitures collected by him, the amount due for his fees and those of the constable in cases in which the defendant was acquitted, or insolvent and unable to pay after conviction, a sum not to exceed fifty dollars for any calendar month; he shall pay the remainder of the fines and forfeitures collected by him to the treasurer or to the custodian of the county funds where there is no county treasurer, same to be paid semi-annually on the first Mondays in January and July of each year, and make his report at the next session of the grand jury; if he should fail to make such payments as herein provided, he shall forfeit all right to make any deduction from his collections for cost due him and the constable for fees as herein provided.

"To perform such other duties as are, or may be, required of him by law."

The above quoted provisions of law appeared in the Code of 1923 as subsection 2 of Section 3850, and have been re-codified in the Code of 1940 without change (Code 1940, Title 13, Section 418).

Under the circumstances, the opinion of the Attorney General reported in the Biennial Report of Attorney General for 1926-1928, at page 702, is a specific answer to your first question. The cited opinion holds that fees of a Justice of the Peace are not such claims as can be paid from the fine and forfeiture fund of the county. I am cognizant of the fact that the above cited opinion considered cases in which the defendants were not convicted, but the same rule is applicable to cases in which execution is returned nulla bona. (See Code of 1940, Title 15, Section 393.)

I wish to advise that in my opinion the answer to your second question must necessarily be in the affirmative. Public drunkenness is a misdemeanor over which the Justice of the Peace has final jurisdiction (See Code of 1940, Title 14, Section 120, and Code of 1940, Title 13, Section 417). The fees due to the Justice of the Peace and his constable should be paid from "fines and forfeitures collected by him." These fees, however, are subject to the limitation that the sum so paid for such fees shall not exceed fifty dollars for any calendar month.

See Quarterly Report of Attorney General, Volume XVII, page 78.

Your third question is answered by my reply to your question numbered 2.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 1, 1941.

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Sheriffs—County Governing Bodies—

Authority to pay Court Reporter for transcribing testimony of witnesses taken in an investigation of crime made by the Sheriff at the direction of the Solicitor.

Opinion by the Attorney General.

Dear Sir:

Your letter of July 14, 1941, in which you request an official opinion, is as follows:

"Under date of March 20, 1941, you rendered an opinion to this office holding that the Board of Revenue had no authority to pay for a transcription of testimony taken prior to and outside of the Grand Jury for use by the Grand Jury.

"Please refer to Section 9 and 10, Title 54, 1940 Code and advise me whether under these sections the Solicitor is authorized to order an investigation of certain crimes by the Sheriff and in making such investigation to obtain written sworn testimony and file same with the Solicitor in making his report and advise me if, by the authority of these two Sections, whether or not the County is authorized to pay for the transcriptions of such testimony in connection with the investigation.

"Am I to assume that the reason for lack of authority by the Board of Revenue to pay for the testimony as rendered in your former opinion that the reason therefor was that the Solicitor did not authorize the Sheriff in writing to make the investigation and a report instead of the Solicitor himself making the investigation and ordering the transcript and having same prepared."

The opinion of this office rendered to you on March 20, 1941 (Quarterly Report of Attorney General, Volume XXII, page 219), was based on an entirely different statement of facts from the facts which you set out in your present letter of inquiry.

It is my opinion that the governing body of a county may legally expend county funds to pay a court reporter or other person for the transcription of testimony of witnesses given in connection with an investigation made by the Sheriff of the county at the direction of the Solicitor, Attorney General or the Governor.

Sections 9 and 10 of Title 54, Code of 1940, referred to in your letter, are, in my opinion, specific authority for this expenditure.

I call your attention, however, to the fact that the duty rests upon the county governing body to audit and allow only those items of cost which it finds were reasonably necessary to the investigation, when the investigation was authorized by the Solicitor.

I do not believe that these provisions of law should be used as a means of paying for the transcription of testimony of witnesses unless such transcription was made in strict compliance with the provisions of Section 9 of Title 54, *supra*. Quarterly Report of Attorney General, Volume XVIII, page 90.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 1, 1941.

Hon. W. P. Tartt,
Register of Circuit Court,
Sumter County,
Livingston, Alabama.

Fiduciary Funds—Registers—

Fiduciary Funds which have been in the hands of a register or other county official for a period of five years, upon proper order of court, should be paid into the county treasury.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated July 29, 1941 follows:

"Please advise me on the following:

"In taking over this office I find there are Fiduciary Funds on hand over 5 years of age and am I not correct to turn these over to the Probate Judge, when he receipts my books for same?"

In answer to the above question, your attention is called to Section 37 of Title 58, Code 1940, which reads as follows:

"§37. **Funds to be paid into county treasury after five years.**—If at any time is (sic) should appear to the court, or be made known to the court, that any balance has been in the hands of any officer for a period of five years and the same remains unclaimed, it may make an order directing the same to be paid into the treasury of said county, and a separate account shall be kept of all such payments and so designated as to identify each transaction."

It will be noted from the above quoted code section that fiduciary funds in the hands of any officer named in Section 30 of Title 58 of the 1940 Code, after the expiration of five years, should, upon proper order of the Court, be paid into the treasury of the county.

You are therefore advised that, in my opinion, upon proper order of the Judge of the Circuit Court of Sumter County, Alabama, all fiduciary funds which have been in your hands for a period of five years or in the hands of your predecessor for a period of five years should be paid into the county treasury and not, as stated by you, turned over to the probate judge.

Biennial Report of Attorney General, 1936-38, page 139.

Yours very truly,

THOMAS S. LAWSON,
Attorney General..

August 2, 1941.

Hon. J. S. Wittmeier,
Judge of Probate,
Blount County,
Oneonta, Alabama.

Filing Tax—Mortgages—Deeds—Judges of Probate—

1. An instrument which is a chattel mortgage only, when offered for record, is subject only to the mortgage filing tax levied by Code 1940, Title 51, Section 619, and is not subject to payment of deed filing tax levied by Code 1940, Title 51, Section 618.

2. An instrument, in the form or nature of a mortgage, but which also contains evidence or recitals of a conveyance of real or personal property within this state, or any interest in any such property, from the mortgagee (vendor) to the mortgagor (vendee), when offered for record, is subject to mortgage filing tax levied by Code 1940, Title 51, Section 619, on the amount of the indebtedness secured thereby, and is also subject to payment of deed filing tax levied by Code 1940, Title 51, Section 618, on the value of the consideration for the conveyance which is paid in cash or other articles of value.

3. It is the duty of the Judge of Probate to ascertain the value of the consideration for the conveyance which is paid in cash or other articles of value.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 1, 1941, in which you request my opinion as follows:

“Will you please give me your official opinion on the following:

“No. 1. Most all mortgages received by me for recording come to me through the mails. The usual type mortgage does not recite the amount that may have been paid down, as a down payment, if any, but simply sets out the amount the mortgage was given for.

“Should I collect a down payment, or deed tax, on such instrument and, if so, how am I to arrive at the amount of deed tax to collect. Are we required to collect a deed tax on a mortgage which does not recite any down payment?

“No. 2. A lease sale contract or any other type of mortgage that does recite a down payment and the amount of such down payment. Am I required to collect a deed tax on such instrument?”

Whether or not an instrument in the form or nature of a mortgage, when offered for record, is subject to the payment of the deed filing tax levied by Code 1940, Title 51, §618, as well as the mortgage filing tax levied by Code 1940, Title 51, §619, does not depend upon whether or not the instrument recites the value of the consideration for the conveyance that may have been paid in cash or other articles of value, but rather, it depends on whether or not the instrument contains evidence or recitals of a conveyance of real or personal property within this state, or any interest in any such property, from the mortgagee (vendor) to the mortgagor (vendee).

If the instrument contains no evidence or recitals of such a conveyance, when it is offered for record, then it is subject only to the mortgage filing tax levied by Section 619, supra, and is not subject to the payment of the deed filing tax levied by Section 618, supra. In this connection, your attention is called to an opinion of this office rendered to Hon. G. C. Blanton, Judge of Probate, Dallas County, Selma, Alabama, under date of July 21, 1941, a copy of which is enclosed for your information, and from which I quote in pertinent part:

"Said form is in my opinion a chattel mortgage form, nothing more, nothing less. Evidently, when executed and completed it will secure a debt by mortgage on a motor vehicle to be definitely described so as to admit of identification. It contains covenants designed to preserve as far as practicable the integrity of the security, and also provides, upon the happening of any event of default, for seizure of the vehicle, and sale thereof, proceeds of sale to be credited upon the debt secured and the expense of seizure, sale, etc.

"I find nothing in this instrument that can be said to operate as a 'deed, bill of sale, or other instrument of like character which conveys any real or personal property *** or *** any interest in any such property,' otherwise than to the mortgagee. Code 1940, Tit. 51, §618. Assuredly, it conveys nothing to the mortgagor. Rather, it may be said, it conveys title out of the mortgagor.

* * *

In conclusion, you are advised that no deed filing tax is due to be paid on the form of chattel mortgage you submitted for examination."

On the other hand, if the instrument contains evidence or recitals of a conveyance of any real or personal property within this state, or any interest in any such property, from the mortgagee (vendor) to the mortgagor (vendee), then, when it is offered for record, it is subject to the payment of the mortgage filing tax levied by Section 619, supra, on the amount of the indebtedness covered by the instrument, and is also subject to the payment of the deed filing tax levied by Section 618, Supra, on the value of the consideration for the conveyance paid in cash or other articles of value. In this connection, your attention is called to an opinion of this office rendered to Hon. J. A. Carnley, Probate Judge, Coffee County, Enterprise, Alabama, under date of July 30, 1935, Office Edition, Vol. 5-A, page 281, a copy of which is enclosed for your information, which dealt with this question under the then applicable statutes levying the mortgage filing tax and deed filing tax, and from which I quote in pertinent part:

"The instrument which is attached to your request for opinion is an ordinary chattel mortgage form. However, there is written into the contract, in describing a part of the property conveyed as security for the debt, the clause:

"One new _____ automobile, Motor No. _____, this day bought from _____, the mortgagee."

"In my opinion, it is thereby shown that the instrument is such 'other instrument of like character which conveys any personal property within this State, or which conveys any interest in any such property' as comes within the contemplation of Schedule 51, *supra*. And before the same should be received for record, a tax of 50c for each \$500.00 or fraction thereof should be exacted as to 'that part of the purchase price which is paid in cash or other articles of value and which pays no other privilege tax for record.'

"In addition, as the portion of the transaction represented by the debt secured by the chattel mortgage, a privilege tax of 15c on each \$100.00 or fraction thereof should be exacted before the same is admitted to record. Schedule 124, Section 334 of Revenue Compilation of 1929. **Biennial Report of Attorney General 1922-1924**, pages 188 and 239.

"Neither the recited consideration of the conveyance nor the purpose for which it is executed determines the liability of the instrument to the tax. The amount of the tax is measured by the value of the property conveyed in the instrument, situated in this State, regardless of the recited consideration or the purpose or character of the conveyance. **Biennial Report of Attorney General 1922-1924**, p. 195. Cf. *State vs. Stiles*, 212 Ala. 468, 102 So. 901."

This view is likewise supported by the holdings of the appellate courts of this state as announced in the case of **Thompson v. Smith**, 27 Ala. App. 460, 174 So. 796, cert. den. 234 Ala. 409, 174 So. 797, also construing the then applicable statutes levying the mortgage filing tax and the deed filing tax. I quote from the opinion of the Supreme Court in that case as follows:

"So that we think, when there is a contract of sale of real or personal property by which either the title is reserved in the vendor as security for the debt, or by which the title passes and what is known as a lien is reserved for that purpose, and such instrument is offered for record, there is due to be paid both the mortgage tax and the deed tax, as provided in Schedules 94 and 46, *supra*, respectively.

* * *

"The instrument here in question does not recite that the seller does thereby sell and convey, nor that he agreed to sell and convey, but that he has sold, and the purchaser had purchased and acknowledged delivery, with the title to remain in the seller until the balance named is paid in full. A deed or conveyance is but evidence of what the parties have agreed. The words used in this contract show the intention of the parties collected from the entire instrument. Section 6839, Code."

When such an instrument is presented to you for recordation, whether the same recites the value of the consideration for the conveyance paid in cash or other articles of value or not, it is your duty to ascertain the value of the same, and to be governed accordingly, in figuring the amount of the deed filing tax. For your guidance in the performance of this duty, I quote as follows from decisions of our appellate courts. In the case of **Long v. Jasper Land Co.**, 217 Ala. 593, 117 So. 210, Mr. Justice Gardner (now Chief Justice) speaking for the court said:

"The determination of the amount of tax to be paid on an instrument is left to the probate judge. In accord with the general rule that fraud and misrepresentation are not to be presumed, we are of the opinion that the probate judge may accept as *prima facie* correct the recitals of the deed (mortgage, conditional sale contract, bill of sale or other instrument of like character) *** and may act accordingly, in the absence of any fact or circumstances to the contrary, coming to his attention calculated to put on notice a reasonably prudent person. Should it develop subsequent to the recordation of the deed that the recitals of the deed were misleading and untrue, the judge of probate, acting in good faith as above indicated, would find protection, though, under the language of the act, there may be a collection of the correct amount of tax due subsequent to the recordation of the deed."

(The words in parentheses in the above quotation are supplied by me.)

In the opinion of the Court of Appeals in **Thompson v. Smith**, *supra*, written by Judge Rice, it was stated:

"We think there can be no doubt that 'the determination of the amount of tax to be paid on an instrument (offered for recordation) is left to the probate judge.' *Long, Judge v. Jasper Land Co.*, 217 Ala. 593, 117 So. 210, 211.

"True, he 'may accept as *prima facie* correct the recitals of the deed (or bill of sale, we interpolate) *** and may act accordingly, **in the absence of any fact or circumstance to the contrary, coming to his attention calculated to put on notice a reasonably prudent person.**' (Italics supplied.) *Long, Judge, v. Jasper Land Co.*, *supra*.

"A reading of the opinion in the *Long, Judge, v. Jasper Land Co.* Case, just cited, persuades us that appellant, here, was within his rights in ascertaining that a cash payment of \$150 had been made on the purchase price of the car described in the instrument offered for recordation at the time of its purchase. And, having **ascertained** this fact, it was his duty to govern himself by that information."

In the opinion of the Supreme Court in said case, written by Mr. Justice Foster, it was said:

"There is no question here argued as to the right of the probate judge to ascertain the value of the property regardless of the recitals of the instrument, ***."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 4, 1941.

Hon. John D. Petree, Director,
Department of Industrial Relations,
Montgomery, Alabama.

Department of Industrial Relations—Workmen's Compensation—
Code 1940, Cumulative Pocket Part, Title 26, Section 299, construed—

Employer or his insurance carrier required to notify Department of Industrial Relations of commutations for compensation for payment in lump sum only when such proposed lump sum settlement is type of case specifically dealt with and designated in Section 299, *supra*.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion under date of July 22, 1941, is as follows:

"I wish to direct your attention to Alabama Code 1940, Cumulative Pocket Part, Title 26, Section 264, which reads, in part, as follows:

"Department of Industrial Relations.—The Director of the Department of Industrial Relations of the State of Alabama shall gather statistics on accidents and their causes and shall generally be responsible for the efficient administration of this Act and to this end shall have full power to make or cause to be made the necessary investigations and examinations in connection with the settlement of all workmen's compensation claims."

"I also wish to direct your attention to Alabama Code 1940, Cumulative Pocket Part, Title 26, Section 299, which reads as follows:

"Payment in Lump Sum.—Where the amounts of compensation payable periodically hereunder have been agreed upon by the parties, and fixed by decision of the court; such periodic payments, upon agreement of the parties, may be commuted to one or more lump sum payments. Compensation due for death or permanent total

disability, or for permanent partial disability resulting from total loss of hearing, or from the loss of an arm or hand, or a foot or a leg, or an eye, or of more than one member, may be commuted only with the approval of the circuit court. In making such commutations, the lump sum payments shall, in the aggregate, amount to a sum equal to the present value of all future installments of compensation calculated upon a six per cent basis. **The circuit court shall not approve any such commutation unless and until it appears and the court so finds that at least ten days prior to the date of such approval the Department of Industrial Relations has been informed by the employer or his insurance carrier by registered mail of the details of the proposed commutation and of the time and place when the commutation will be presented to the court for its approval; any authorized representative of the Department may appear at the hearing of such cause and shall have the right to offer evidence.** (Emphasis supplied)

"In many instances, insurance carriers and self-insured employers are notifying the Department of Industrial Relations in each and every case. In other instances, insurance carriers and self-insured employers are notifying the Department of computations of compensation for payment in lump sums only when such proposed lump-sum settlement is confined to the type cases referred to and described in the provisions of Section 299 quoted herein.

"In giving consideration to the duties and responsibility placed upon the Department of Industrial Relations for the efficient administration of the Workmen's Compensation Law, the question arises as to whether the Department should require insurance carriers and self-insured employers to notify it in each and every case or whether it should instruct the insurance carriers and self-insured employers to notify it only in those cases referred to and described in the provisions of Section 299."

It will be noted that the first sentence of Section 299 of Title 26, Code of 1940 (Cumulative Pocket Part), referred to in your letter, provides in substance that where the amount of compensation payable periodically has been agreed upon by the parties, and fixed by decision of the court, then such periodic payments, upon agreement of the parties, may be commuted to one or more lump sum payments. In other words, the amount of compensation payable periodically must be agreed upon by the parties and fixed by decision of the court, but such periodic payments may be commuted to one or more lump sum payments solely upon an agreement between the parties.

From the second sentence of Section 299, *supra*, it will be seen, however, that in those particular compensation cases due to "death or permanent total disability, or for permanent partial disability resulting from total loss of hearing, or from the loss of an arm or hand, or a foot or a leg, or an eye, or of more than one such member," a lump sum settlement can only be made with the approval of the circuit court. In other words, those compensation cases specifically dealt with and designated in the second sentence of Section 299, *supra*, can only be commuted to one or more lump sum payments by the approval of the circuit court. It therefore follows that only in those compensation cases specifically dealt with in the second sentence of Section 299, *supra*, is it necessary that an employer or his insurance carrier give the De-

partment of Industrial Relations the notice required in the third sentence of Section 299, supra. Certainly, it was not the intention of the Legislature that the said notice be given in those cases not specifically dealt with or designated in the second sentence of Section 299, supra, as in such cases, after the amount of the compensation payable periodically has been agreed upon by the parties and fixed by decision of the court, such periodic payments may be commuted to one or more lump sum payments solely upon an agreement between the parties.

Therefore, answering your specific inquiry, it is my opinion that the Department of Industrial Relations can require the notice provided for in Section 299, supra, only in those specific compensation cases dealt with in the second sentence of Section 299, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 4, 1941.

Hon. Perry B. Hughes, Jr.,
Clerk, Circuit Court,
Tuscaloosa County,
Tuscaloosa, Alabama.

Costs—Appeal and Error—Supersedeas Bond—

1. Where appellate court remands cause for a new trial, and the judgment of the appellate court is silent as to the payment of the costs in the trial court, the costs in the trial court, costs of the appeal excepted, will abide the event of the suit, and will be governed by the judgment on final disposition of cause.

2. Joint supersedeas and appeal bond liable for costs of both trials in the lower court, when cause has been appealed, remanded, tried again, and supersedeas bond is then made.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of February 19, 1941, is as follows:

"I have tried a case in which I would like to state the facts and have your opinion on how to proceed.

"The case with which I have reference was tried in the Circuit Court April 14, 1938; the plaintiff recovered a judgment against the defendants

for possession of land sued for and \$15.00 damages for detention of same. The defendants appealed this case to the Supreme Court and same was reversed.

"This case was tried again on April 8, 1940, the plaintiff recovered a judgment against the defendant for possession of land sued for and \$3.00 for detention of same. The defendants (appellants) made a supersedeas bond to the Supreme Court in the sum of \$150.00 fixed by the Presiding Judge. No bill of exceptions was ever filed and the plaintiff's (appellee's) attorney secured a certified copy of appeal bond and certified copy of judgment entry and made a motion to dismiss this appeal and used the certified copy as exhibits in support of his motion. This appeal was dismissed by the Supreme Court on motion of plaintiff (appellee) and ordered defendants (appellants) and surety on bond to pay costs accruing on said appeal in Supreme Court and in Court below.

"Who would be responsible for costs of first appeal and could I issue execution against party for this?

"Would the defendants (appellants) and surety be responsible for costs of first trial and second trial and could execution issue against them for judgment, and costs of both trials, excluding appeal and costs? The costs in this case including both trials and excluding appeal costs of first trial amount to \$210.75 and the supersedeas bond was made for only \$150.00. Please tell me how to proceed.

"P. S. See *Noland v. Henderson*, 238 Ala. 213, 189 So. 732, 123 A. L. R. 483."

Upon referring to the Supreme Court docket, I find that the judgment of said court on the first appeal of the case in question, namely, **Henderson, et al. vs. Noland**, 238 Ala. 213, 189 So. 732, provides as follows:

"It is also considered that the appellee pay the **costs of appeal** of this court and of the circuit court." (Emphasis supplied)

This order only covers costs in the Supreme Court and costs accrued in the Circuit Court **on account of the appeal having been taken**. It does not cover those costs in the circuit court which accrued prior to the time of taking the appeal. **King & Owen vs. McCann**, 25 Ala. 471.

In the collection of costs covered in the order of the Supreme Court, should execution against the appellee be returned "No property found," you could then proceed against the appellants and the sureties on the appeal bond. Code of 1923, Sec. 7263, (Code 1940, Title 11, Sec. 7); **Greenfield vs. Powell**, 220 Ala. 690, 127 So. 171.

The costs accruing in the Circuit Court on the first trial, excluding those covered by order of the Supreme Court, should be treated as in abeyance pending final determination of the case. The \$150.00 supersedeas bond referred to in your letter, is in fact a joint appeal and supersedeas bond. It was given by defendants (appellants) on the second appeal and is liable for

all costs incurred on account of said appeal both in the Supreme Court and the Circuit Court, as well as the costs which accrued in the Circuit Court on both trials in said court. Since this bond is not sufficient to take care of these costs, you should proceed against the defendants personally for the additional \$60.75. Code 1923, Sections 6131 and 6133 (Code 1940, Title 7, Sections 792, 794); 20 C. J. S. Costs, Section 310(b).

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 6, 1941.

Hon. J. F. Davis, President,
Court of County Commissioners,
Covington County,
Andalusia, Alabama.

Covington County—Clerks of Circuit Court—

The provisions of Act No. 196, H. 310, approved March 15, 1939 (Local Acts, 1939, page 107), authorizing payment from the General Fund not to exceed \$300 annually for claims against the Fine and Forfeiture Fund, are applicable to the ex-clerk as well as the present clerk. Said \$300 maximum applies to the ex-clerk and present clerk separately.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of July 30, 1941, in which you request my official opinion, is as follows:

"Act No. 196 approved March 15, 1939 in Local Acts of 1939, page 107, provides that the Sheriff and Clerk of the Circuit Court of Covington County, Alabama, be paid from the General Funds of said County all fees and commissions, which Section 4039 Code of 1923 or as the same may be amended, directs to be paid from the Fine and Forfeiture Funds of said County, total of said payments not to exceed \$300.00 annually to the Clerk and \$300.00 annually to the Sheriff.

"Please give me your official opinion of the following questions:

"1. 'Is it legal for the Court of County Commissioners to pay out of the General Funds a claim made by the ex-clerk of the Circuit Court of Covington County for fees and commissions due him while in office?'

"If the answer to the first question is in the affirmative, please advise

"2. 'Whether or not both the Ex-Clerk and the present Clerk would draw \$300.00 each annually, or \$300.00 together'."

Your inquiries involve an interpretation of Act No. 196, H. 310, approved March 15, 1939 (Local Acts, 1939, page 107). The sections of said act pertinent thereto are as follows:

"Section 1. That from and after the passage of this act, and its approval by the Governor, all fees and commissions of the Sheriff, and of the Clerk of the Circuit Court, of Covington County, Alabama, payable from the fine and forfeiture fund of said county pursuant to the provisions of section 4039, Code of 1923, as the same is now written or may be amended, shall be paid from the general fund of said county. The total of said payments from the general fund shall not exceed \$300.00 annually to the clerk and \$300.00 to the sheriff, to be computed each twelve months succeeding the effective date of this act."

"Section 2. The said Clerk and Sheriff shall file monthly with the governing body of said county a verified statement showing each item and the amount of such fees and commissions to which each is entitled to payment from said fine and forfeiture fund pursuant to the provisions of said section 4039, supra, and shall state under oath whether or not a motion to retax said costs or commissions is pending. If said county governing body finds such statement to be correct, and that there is no motion pending to retax any of said costs or commissions, they shall make and enter an order that the clerk of said court draw a warrant in favor of each affiant against the general fund of said county for the amount of (sic) for respective claim for which no motion to retax the items thereof is pending. If a motion is pending, then the warrant shall be drawn only for such items as to which there is no motion pending."

"Section 4. The provisions hereof shall apply only to those fees and commissions due for services rendered after the effective date of this act."

If the claim of the ex-clerk was for services rendered after the effective date of the act (viz: March 15, 1939), did not exceed the \$300 per annum maximum, and was properly presented to and approved by the county governing body in accordance with said act, I am of the opinion that your first inquiry should be answered in the affirmative. There is nothing in the act which would preclude a clerk from receiving payment for services rendered while he was in office after his term of office expired or he otherwise ceased to hold said office, provided his claim is for services rendered after the passage and approval of said local act.

In view of the former rulings of this office concerning situations analogous to the one presented in your second inquiry, I am of the opinion that the \$300 per annum maximum is applicable separately to the ex-clerk and the present clerk and not to both of them together. Quarterly Reports of

Attorney General, Volume XV, page 121; Quarterly Reports of Attorney General, Volume X, page 5. In other words, the ex-clerk and the present clerk may draw \$300 each annually provided they have legal claims in that amount.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 7, 1941.

Hon. W. H. Quillin, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

OPERATION OF MOTOR TRUCKS, SEMI-TRAILERS, ETC.

1. Code, 1940, Title 36, Section 83, fixes the penalty for a violation of the provisions of law regulating the character of the motor truck, semi-trailer truck, etc., and the character of loads thereon.

2. Code, 1940, Title 36, Section 5, regulates the speed of the trucks on public highways and prescribes the punishment for violation thereof.

3. There is no conflict in the provisions of the two sections.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of July 31, 1941, is as follows:

"On July 30, 1941, A was arrested on a charge of unlawfully operating a motor truck used primarily for the transportation of property on a public highway outside of an incorporated town in Franklin County at a greater rate of speed than forty miles per hour.

"I have in mind Code of Alabama of 1940 Title 36 Section 5 and also Sections 8 and 11 of the General Acts of the Legislature of Alabama of 1939, page 690.

"The said Act of the Legislature of Alabama of 1939 page 690 approved September 19, 1939 provides that the minimum fine shall be \$100.00 for the above mentioned offense. The said Code Section of the Code of 1940 does not provide that the minimum fine shall be \$100.00 for speeding with a truck.

"Please advise me if a fine is imposed on A for the above mentioned offense, what is the minimum fine that may be imposed? Please give me your opinion. Does the Section of the 1940 Code repeal the Act of 1939 fixing the minimum fine at \$100.00?"

The Legislature by Act No. 628, H. 517, approved July 2, 1940 (General Acts, 1939, page 995), approved a code of laws for the State of Alabama.

By Section 2 of this act it is provided that the code shall go into effect on the thirteenth day after the date of the governor's announcing its publication and shall govern completely the subjects to which it relates and further that no statute enacted on or after the 25th day of June, 1940, shall be repealed by the adoption of the code. Section 4 of this act provides that the code so adopted and published must be received as the law in all courts and in all proceedings before boards, etc.

The Code of 1940 covers all the statutory law of this state on the subjects to which it relates except acts of the Legislature enacted on or after June 25, 1940. The act of the Legislature to which you refer dealing with the operation of motor trucks used primarily for transportation of property and fixing the speed thereof (General Acts, 1939, pp. 687-691) has been superseded by the Code of 1940 because this act was adopted prior to June 25, 1940. However, much of its provisions are re-arranged and incorporated into the Code of 1940. I find in Code of 1940, Title 36, Section 83, this language:

"§83. **Penalties; in general.**—The operation of any motor truck, semi-trailer truck or trailer, in violation of any section of this chapter, or of the terms of any permit issued hereunder, shall constitute a misdemeanor, and the owner thereof, if such violation was with his knowledge or consent, and the operator thereof, shall on conviction be fined not less than one hundred dollars nor more than five hundred dollars, and may also be imprisoned or sentenced to hard labor for the county for not less than thirty days nor more than sixty days."

It will be seen that this language was taken substantially from Section 5 (General Acts, 1939, page 690). The provisions of Title 36, Section 83, are limited to the operation of motor trucks, trailers, etc., "**in violation of any section of this chapter.**" (Emphasis supplied) This chapter referred to is Chapter 3 beginning with Section 76 and ending with Section 94. This chapter deals primarily with the character of the truck and trailer and the loads thereon and signals attached thereto. Nothing in the chapter refers to the speed of the truck. The speed and manner of operating motor vehicles are fixed, controlled and punished by Chapter 1, Title 36, Section 5, referred to in your letter. This section provides:

" *** No person shall operate any motor truck or motor vehicle used primarily for transportation of property or any semi-trailer truck on any highway outside cities or incorporated towns at a greater rate of speed than forty miles per hour *** ."

This section also declares that a violation of the above quoted provisions constitutes a misdemeanor and fixes the punishment "by fine of not more

than one hundred dollars or by imprisonment in the county or municipal jail for not more than ten days" for the first offense. It is self-evident that there is no conflict between the punishment fixed by the above Sections 5 and 83. The punishment fixed in said Section 5 applies to a conviction in the case referred to in your letter.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 12, 1941.

Hon. A. R. Forsyth,
Director of Finance,
Capitol.

**Statutes — Appropriations — Teachers' Retirement System —
Schools —**

1. Act No. 518, H. 494, approved September 21, 1939, (General Acts, 1939, page 897) is still in full force and effect, notwithstanding its omission from the Code, 1940, and notwithstanding the provisions of Code, 1940, Title 51, Section 16.

2. The first \$400,000 of any surplus over and above \$750,000 in the State Treasury to the credit of the General Fund, after providing for the payment of all appropriations now or hereafter made payable from said fund, for each of the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, should be transferred to the Teachers' Retirement Fund, as provided by Act No. 518, supra.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of August 7, 1941, is as follows:

"The Act approved September 21, 1939, being No. 518, Acts of 1939, page 807, provides that the first \$400,000 of any surplus over and above \$750,000 in the State Treasury to the credit of the General Fund for each of the fiscal years ending September 30, 1939, 1940, 1941, 1942 and 1943 is hereby appropriated and shall be transferred permanently to the Retirement Fund for teachers.

"Title 51, Section 16, page 36, Code of Alabama, provides:

"The surplus over and above \$750,000 in the General Fund shall be transferred into and become a part of the Property Tax Relief Fund."

"Please advise me which of these conflicting provisions shall prevail as of September 30, 1941, as the surplus in the General Fund as of that date will probably exceed \$750,000 by a substantial amount."

The Teachers' Retirement System of Alabama was provided for by Act No. 419, S. 362, approved September 15, 1939, (General Acts, 1939, page 559). This act is codified in the Code of 1940 as Title 52, Chapter 14, Sections 362-372.

An appropriation to provide a retirement fund for teachers in the state-supported schools and colleges was made by the same Legislature by Act No. 518, H. 494, approved September 21, 1939, (General Acts, 1939, page 807) (the act referred to in your letter of inquiry). This act was approved just six days after the approval date of Act No. 419, supra, which provided for the Teachers' Retirement System of Alabama, and reads, in its entirety, as follows:

"AN ACT

"To appropriate the first \$400,000.00 of any surplus over and above \$750,000.00 in the State Treasury to the credit of the General Fund, after providing for the payment of all appropriations now or hereafter made payable from said fund, for each of the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942 and September 30, 1943, to provide a retirement fund for teachers in the State supported schools and colleges, to be expended in accordance with such statutes and regulations as may then be in force relating to the expenditure of such fund.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That the first \$400,000.00 of any surplus over and above \$750,000.00 in the State Treasury to the credit of the General Fund, after providing for the payment of all appropriations now or hereafter made payable from said fund, for each of the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942 and September 30, 1943, is hereby appropriated and shall be transferred permanently to a retirement fund for teachers in the State supported schools and colleges to be expended in accordance with the statutes and regulations then existing relating to the expenditure of such Teachers' Retirement Fund.

"Section 2. That at the close of each of the fiscal year ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942 and September 30, 1943, the Comptroller is authorized and required to draw his warrant for the first \$400,000.00 in the State Treasury to the credit of the General Fund over and above \$750,000.00, after providing for the payment of all appropriations now or hereafter made payable

from said fund, payable to the State Treasurer to be covered by him into the State Treasury to the credit of the Teachers' Retirement Fund

"Section 4. That all laws and parts of laws, general, special or local, in conflict with the provisions of this Act are hereby expressly repealed.

"Section 5. That this Act shall become effective immediately upon its passage and approval by the Governor.

"Approved September 21, 1939."

It is the only provision of the statutory law of this State making any appropriation whatever from the State of Alabama for this purpose.

Act No. 518, supra, was not included in the Code of 1940. This is generally true as to appropriation acts. (Act No. 239, S. 238, approved August 22, 1939, (General Acts, 1939, p. 399), generally referred to as the School Appropriation Act of 1939, and Act No. 247, S. 239, approved August 24, 1939, (General Acts, 1939, p. 411), generally referred to as the General Appropriation Act of 1939, are likewise omitted from the Code of 1940.)

However, the mere omission of Act No. 518, supra, from the Code of 1940 does not operate to repeal or in any manner affect the same, because of Code of 1940, Title 1, Section 9, which reads in pertinent part:

"Local, private, or special statutes, and **those public laws** not of general and permanent nature, and those relating to the swamp and overflowed land, and **those relating** to the public debt, and **appropriations**, and any act submitting an amendment to the Constitution, and any act to be effective upon the adoption of such an amendment of the Constitution, **are not repealed by this Code.**" (Emphasis supplied)

This is too clear to admit of argument.

While this is true, it is suggested that the following excerpt from Code of 1940, Title 51, Section 16, (referred to and quoted in part in your letter of inquiry) operates to repeal Act No. 518, supra:

"The surplus over and above seven hundred and fifty thousand dollars in the state general fund, after all State appropriations now or hereafter payable from the state general fund are paid in full on September thirtieth of each fiscal year, shall be transferred from the state general fund into and become a part of the property tax relief fund."

This is a codification of Section 2 of Act No. 127, S. 16, approved February 23, 1937, (General Acts, 1936-37, page 142), generally known as the Property Tax Relief Fund Act. The effect of this section had been suspended for the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, by virtue of the provisions of Act No. 518, supra, and Act No. 447, H. 495, approved September

21, 1939, (General Acts, 1939, page 599), which provides for the transfer of any surplus over and above \$1,150,000 in the State Treasury to the credit of the General Fund, after the payment of all appropriations now or hereafter made payable from said fund for each of the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, to the Minimum Program Fund. Cf. 59 C. J. 940, Section 553; *State ex rel. Holcombe v. Mobile County*, 238 Ala. 656, 193 So. 315. However, since it has been incorporated in the Code of 1940, it must be said to be a part of the existing statutory law of the State. *State v. Towery*, 143 Ala. 48, 39 So. 309; *Bush v. Greer*, 235 Ala. 56, 177 So. 341.

So that there are existing statutory provisions which apparently conflict, but, as will hereinafter be shown, the effect of the above quoted part of Title 51, Section 16, is still suspended for the fiscal years dealt with in Acts No. 518 and 447, supra, by virtue of said acts, just as was the effect of Section 2 of Act No. 127, supra, from which it derives, prior to the effective date of the Code.

In this situation (where there are existing statutory provisions which apparently conflict) it is necessary to ascertain the legislative intent, and to give a field of operation to both statutory provisions, if possible. The same Legislature which enacted Act No. 419, supra, providing for the Teachers' Retirement System of Alabama, and Act No. 518, supra, providing a retirement fund for teachers in State-supported schools and colleges, also enacted the Code of 1940. There is also included in the Code of 1940, as a part of Title 52, Chapter 14, dealing with the Teachers' Retirement System, Section 369, which reads in pertinent part:

"For the period prior to October 1, 1943, the total amount transferred to the retirement system shall be limited to the amounts made available in the act or acts appropriating funds for a retirement fund for teachers, adopted by the legislature of 1939. The amounts appropriated by said act or acts, or such parts thereof as may be available in case the full amount is not available in any year, shall be paid to this retirement system each year and deemed expended in the year, by first crediting to the expense fund a sum not in excess of ten thousand dollars in each year, next by crediting to the pension accumulation fund the amount ascertained by the board of control to be due to such fund, and the balance to the pension fund."

This seems to be a clear recognition of the fact that the Legislature did not intend to repeal Act No. 518, supra, which is the only act making a State appropriation to provide a retirement fund for teachers in the State-supported schools and colleges.

To hold that the above quoted excerpt from Code of 1940, Title 51, Section 16, was intended to repeal the provisions of Act No. 518, supra, would be to hold that the same Legislature which provided for the Teachers' Retirement System of Alabama (Act No. 419, supra) and made an appropriation to provide a retirement fund for teachers in the State-supported schools and colleges (Act No. 518, supra) also intended to repeal the appropriation, thus making it impossible for the Teachers' Retirement System of Alabama, for which it had provided, to operate. Such a construction would lead to such

unreasonable, unjust or absurd consequences as to compel the conviction that it could not have been intended by the Legislature. See **Abramson v. Hard**, 229 Ala. 2, 155 So. 590, and authorities therein cited.

Consequently, it is my opinion that Act No. 518, *supra*, is not repealed or affected in any manner, either by its omission from the Code of 1940, or by the inclusion of the above quoted excerpt from Title 52, Section 16, in the Code of 1940. On the contrary, it is my opinion that said act remains in full force and effect, and that the first \$400,000 of any surplus over and above \$750,000 in the State Treasury to the credit of the General Fund, after providing for the payment of all appropriations now or hereafter made payable from said fund, on September 30, 1941, should be transferred to the Teachers' Retirement Fund. (The same is true as to the first \$400,000 of any surplus over and above \$750,000 in the State Treasury to the credit of the General Fund, after providing for the payment of all appropriations now or hereafter made payable from said fund, on September 30, 1942 and September 30, 1943.)

In so holding, a field of operation may still be given to the above quoted excerpt from the Code of 1940, Title 51, Section 16. Act No. 518, *supra*, only provides for the transfer of the surplus therein dealt with to the Teachers' Retirement Fund for certain enumerated fiscal years, the last fiscal year being the one ending on September 30, 1943. After that time, the above quoted excerpt from Code of 1940, Title 51, Section 16, will be effective to provide for a transfer of this surplus to the Property Tax Relief Fund, unless subsequent legislation provides for a different disposition of the same.

The conclusions which I have reached hereinabove are in accord with the following known rules of statutory construction:

1. Statutes relating to the same subject matter should be construed in *pari materia*, and each should be given a field of operation, if possible. See cases collated in 18 Ala. Digest, 130, Statutes, Key No. 225.
2. Especially is this true when the statutes are enacted at the same session of the Legislature. See cases collated in 18 Ala. Digest, 132, Statutes, Key No. 225½.
3. Statutes, the meanings of which are doubtful, should be given a rational and sensible construction. **Shepherd v. Clements**, 224 Ala. 1, 141 So. 255. Cf. **Abramson v. Hard**, *supra*, and cases collated in 18 Ala. Digest, 120, Statutes, Key No. 181(2).
4. In determining the Legislature's intention in the enactment of statutes, recourse may be had to considerations of public policy, and the Legislature's established policy, as disclosed by the general course of legislation. See cases collated in 18 Ala. Digest, 121, Statutes, Key No. 184.
5. The fundamental rule in the construction of statutes, to which all other rules are subordinate, is that the intention of the Legislature should

be ascertained, and, when ascertained, it is the law. See cases collated in 18 Ala. Digest, 119, Statutes, Key No. 181(1).

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 12, 1941.

Hon. A. R. Forsyth,
Director of Finance,
Capitol.

Statutes—Appropriations—Minimum Program Fund—Schools—

1. Act No. 447, H. 495, approved September 21, 1939 (General Acts, 1939, page 599), is still in full force and effect, notwithstanding its omission from the Code of 1940, and notwithstanding the provisions of Code, 1940, Title 51, Section 16.

2. The surplus over and above \$1,150,000 in the State Treasury to the credit of the General Fund, after the payment of all appropriations now or hereafter made payable from said fund, for each of the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, should be transferred to the Minimum Program Fund, as provided by Act No. 447, supra.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of August 7, 1941, is as follows:

"The Act approved September 21, 1939, being No. 447, Acts of 1939, page 599, provides that the surplus in the General Fund as at September 30, 1939, 1940, 1941, 1942, and 1943, in excess of \$1,150,000, shall be transferred to the Minimum Program Fund for expenditure for school purposes in the succeeding fiscal year.

"Title 51, Section 16, page 36, Code of 1940, provides:

"The surplus over and above \$750,000 in the General Fund shall be transferred into and become a part of the Property Tax Relief Fund."

"Please advise me which of these conflicting provisions shall prevail as of September 30, 1941, as the surplus in the General Fund as of that will probably exceed \$1,150,000 by a substantial amount."

Act No. 447, H. 495, approved September 21, 1939 (General Acts, 1939, page 599), reads, in its entirety, as follows:

"AN ACT

"To provide for the transfer of any surplus over and above \$1,150,000.00 in the State Treasury to the credit of the General Fund, after the payment of all appropriations now or hereafter made payable from said fund, for each of the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942 and September 30, 1943, to the Minimum Program Fund for expenditure during the fiscal year next succeeding the fiscal year in which said surplus accrues, in accordance with the statutes and regulations of the State Board of Education relating to the expenditure of such fund.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That any surplus over and above \$1,150,000.00 in the State Treasury to the credit of the General Fund, after the payment of all appropriations now or hereafter made payable from said fund, for each of the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942 and September 30, 1943, shall be transferred to the Minimum Program Fund.

"Section 2. That at the close of each of the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942 and September 30, 1943, the Comptroller is authorized and required to draw his warrant for all moneys in the State Treasury to the credit of the General Fund over and above \$1,150,000.00, after the payment of all appropriations now or hereafter made payable from said fund, payable to the State Treasurer to be covered by him into the State Treasury to the credit of the Minimum Program Fund.

"Section 3. That the moneys so transferred from the General Fund to the Minimum Program Fund shall be available for expenditure during the fiscal year next succeeding the fiscal year in which such surplus accrues, but must be expended in accordance with the statutes and regulations of the State Board of Education relating to the expenditure of such Minimum Program Fund.

"Section 4. That all laws and parts of laws, general, special, or local, in conflict with the provisions of this Act are hereby expressly repealed.

"Section 5. That this Act shall become effective immediately upon its passage and approval by the Governor or its otherwise becoming a law.

"Approved September 21, 1939."

Code of 1940, Title 51, Section 16, reads in pertinent part:

"The surplus over and above seven hundred and fifty thousand dollars in the state general fund, after all state appropriations now or hereafter payable from the state general fund are paid in full on September thirtieth of each fiscal year, shall be transferred from the state general fund into and become a part of the property tax relief fund."

In an opinion this day rendered to you in regard to the appropriation to the Teachers' Retirement Fund made by Act No. 518, H. 494, approved September 21, 1939 (General Acts, 1939, page 807), I held:

" *** it is my opinion that Act No. 518, supra, is not repealed or affected in any manner, either by its omission from the Code of 1940, or by the inclusion of the above quoted excerpt from Title 52, Section 16, in the Code of 1940. On the contrary, it is my opinion that said Act remains in full force and effect, and that the first \$400,000 of any surplus over and above \$750,000 in the State Treasury to the credit of the General Fund, after providing for the payment of all appropriations now or hereafter made payable from said fund, on September 30, 1940, should be transferred to the Teachers' Retirement Fund. (The same is true as to the first \$400,000 of any surplus over and above \$750,000 in the State Treasury to the credit of the General Fund, after providing for the payment of all appropriations now or hereafter made payable from said fund, on September 30, 1942 and September 30, 1943.)"

The legal propositions there involved are strikingly similar to those here involved.

For the same reasons that led me to that conclusion, and on the basis of the authorities cited in that opinion in support of that conclusion, I now advise you as follows in regard to Act No. 447, supra: It is my opinion that Act No. 447, supra, is not repealed or affected in any manner, either by its omission from the Code of 1940, or by the inclusion of the above quoted excerpt from Title 52, Section 16, in the Code of 1940. On the contrary, it is my opinion that said act remains in full force and effect, and that the surplus over and above \$1,150,000 in the State Treasury to the credit of the General Fund, after the payment of all appropriations now or hereafter made payable from said fund, on September 30, 1941, should be transferred to the Minimum Program Fund. (The same is true as to the surplus over and above \$1,150,000 in the State Treasury to the credit of the General Fund, after the payment of all appropriations now or hereafter made payable from said fund, on September 30, 1942, and September 30, 1943.)

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 12, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Sales Tax Act—Intrastate sales to railroad company—Code 1940,
Title 51, Sections 753, 755(a)—

Sales to railroad company of tangible personal property at retail by sellers located in Alabama are taxable as intrastate sales under the Alabama Sales Tax Act, although such purchaser advises at the time that it contemplates transporting such property outside the State and would thereafter transport the same on its own account outside the State.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of July 28, 1941, follows:

"In an opinion rendered by A. A. Carmichael, Attorney General, July 5, 1938 (Biennial Report for 1936-1938, p. 692), it was held in effect that the sale to a railroad company of tangible personal property at retail within the State of Alabama f. o. b. cars of such railroad company, to be transported by such railroad company for its own account to a point outside of the State of Alabama, constituted a sale in interstate commerce and was, therefore, not taxable under the provisions of the Alabama Luxury Tax Act approved February 23, 1937.

"In certain instances, it appears that railroad companies purchase tangible personal property at retail from dealers or manufacturers within the State of Alabama, f. o. b. cars of the purchasing carrier, after which the carrier itself transports such goods for its own account, without involving the payment of any freight thereon, to a point in another state. Upon representations made by the buyer to the seller that the buyer contemplates such transportation of the goods on its own behalf for use in another state, the transactions have been treated as interstate sales, under the above mentioned opinion.

"Since the rendition of said opinion, the Supreme Court of the United States has rendered two decisions which seem to have a bearing upon these questions (**Dept. of Treasury of the State of Indiana v. Wood Preserving Corporation**, 85 L. Ed. 817; **Southern Pacific R. R. Co. v. Gallagher**, 306 U. S. 167, 83 L. Ed. 586), and we shall, therefore, appreciate your reconsideration of these questions in the light of the above mentioned decisions of the Supreme Court of the United States, and to advise this Department whether sales of tangible personal property at retail made by sellers located in Alabama for delivery f. o. b. cars of the railroad purchasing such property constitute intrastate sales taxable under the present Alabama Sales Tax Act, notwithstanding the fact that the railroad company purchasing such property advises at the time

that it contemplates the transportation of such property to a point outside of the State of Alabama, and does hereafter transport such material on its own account to a point outside of the State of Alabama."

The two opinions above referred to of the Supreme Court of the United States are, I think, conclusive upon the question you ask.

In **Department of Treasury of the State of Indiana v. Wood Preserving Corporation**, (U. S. Supreme Court), 85 L. ed. 817, decided April 28, 1941, that court held that where the Wood Preserving Corporation sold and delivered to a railroad company in Indiana railroad crossties to be shipped out of Indiana by the railroad company at its own expense, such a transaction was taxable under the Indiana statute, although payment for the ties so sold and delivered was made in another State.

In the present instance, there appears to be a completely executed taxable event by sale and delivery in Alabama of property to a railroad company although such property may be destined for shipment by the railroad company for its own use outside the State. Such sale and delivery are not, under the doctrine announced in the Wood Preserving Corporation case, an integral or necessary part of interstate commerce.

See also **Southern Pacific Co. v. Gallagher**, 306 U. S. 167, 83 L. ed. 586; **Pacific Tel. & Tel. Co. v. Gallagher**, 306 U. S. 182, 83 L. ed. 595.

You are therefore advised that, in my opinion, sales to a railroad company of tangible personal property at retail by sellers located in Alabama followed by a delivery of the property in Alabama are taxable as intrastate sales under the Alabama Sales Tax Law (Code 1940, Title 51, §§753, 755(a)), although such purchaser advises at the time that it contemplates transporting such property outside the State and does thereafter transport the same on its own account outside the State.

The opinion of this office, therefore, dated July 5, 1938 to Hon. Henry S. Long, Chairman, State Tax Commission, (Biennial Report, Attorney General, 1936-38, page 692) in so far as it conflicts with the views above set forth, is hereby overruled and withdrawn in view of the late decisions of the Supreme Court of the United States, cited supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 12, 1941.

Hon. W. D. Partlow, Superintendent,
The Alabama State Hospitals,
Tuscaloosa, Alabama.

Insane Hospitals—Appropriations—Alabama Citizens' Committee—

Funds appropriated for the support, maintenance, repair and improvement of the Alabama State Hospitals cannot be expended for payment of expenses of the Alabama Citizens' Committee (Code, 1940, Title 45, Section 229).

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion bearing date of August 7, 1941, is as follows:

"Will you kindly answer for me over the signature of the Attorney General the following question:

"Would the payment of expenses of The Alabama Citizens' Committee, a voluntary committee serving The Alabama State Hospitals and The State School for Mental Deficients purely on a voluntary basis without authorization of law, be a proper and legal application or expenditure of funds appropriated for the 'support, maintenance, repairs and improvements of The Alabama State Hospitals'—such appropriation as provided for in Section 1463 of the Code of Alabama of 1923?"

I am of the opinion that your inquiry should be answered in the negative.

Section 1463 of the Code of 1923, referred to in your letter, appears in the Code of 1940 as Section 229 of Title 45. Said section provides in pertinent part as follows:

"For the support, maintenance, repairs and improvement of the Alabama state hospitals, a sum regulated by the board of trustees, not to exceed four dollars a week shall be paid monthly every year by the state for every one of all the indigent and criminal patients, that the superintendent certifies were present in the hospitals on the last day of the preceding month. *** " (Emphasis supplied)

In an opinion of this office rendered to the Judge of Probate of Autauga County on June 15, 1937 (Quarterly Reports of Attorney General, Vol. VII, page 219), it was held that a county had no authority to appropriate funds to the Alabama Citizens' Committee in the interests of the State Hospitals and public health. In said opinion it was observed:

"It is my understanding from the facts set out in your letter that the Alabama Citizens' Committee is not incorporated, but is a voluntary

organization of public spirited citizens residing in various counties of the State. The purposes of the organization are not set out, but it appears that the main purpose of the committee is to secure the passage of various laws applicable to the State as a whole.

"While it appears that the Alabama Citizens' Committee is working for a good purpose, I find no authority which would authorize the Board of Revenue to appropriate to such Alabama Citizens' Committee a portion of the revenue allocated to Autauga County from the Sales Tax and the Liquor Tax."

The opinion also called attention to Section 73 of the Constitution of 1901, which provides as follows:

"No appropriation shall be made to any charitable or educational institution not under the absolute control of the State, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all members elected to each house."

The appropriation under present consideration is the support, maintenance, repairs and improvements of the Alabama State Hospitals. In view of the foregoing discussion, I am of the opinion that said appropriation cannot be expended for the payment of the expenses of the Alabama Citizens' Committee, a voluntary committee serving The Alabama State Hospitals and The State School for Mental Deficients purely on a voluntary basis and without authorization of law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 13, 1941.

Hon. J. Houston Morris,
Treasurer, Cleburne County,
Heflin, Alabama.

**Officers' and Witnesses' Claims Against Fine and Forfeiture Fund
of Cleburne County—**

Claims of officers against the fine and forfeiture fund must be made out and filed with the Court of County Commissioners of Cleburne County, passed by said Court and registered with the County Treasurer within six months, and all witness claims must be presented to the Treasurer for registration against the Fine and Forfeiture Fund of the county within six months, or else they are forever barred.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of July 25, 1941, in which you request an official opinion, is as follows:

"Will you please give me an opinion on the following?

"The Ex-Sheriff, the Ex-Clerk and several witnesses have claims against the Fine and Forfeiture Fund of Cleburne County, which were not actually filled out by the Clerk until after six months from the time of the defendant's acquittal, but after being filled out by the Clerk they were registered by the Treasurer of Cleburne County and are now in line for payment.

"I have money with which to pay these claims and the officers did the work. It was an oversight that the claims were not filled out until after six months subsequent to the disposal of the case.

"Will you please give me your opinion as to whether or not I can legally pay these claims."

Cleburne County is now operating its fine and forfeiture fund under a local act, which is Act No. 415, H. 453, approved February 21, 1887 (General Acts, 1886-87, page 859).—Quarterly Report of Attorney General, Volume XXI, page 223. Section 4 of said act provides as follows:

"Sec. 4. **Be it further enacted.** That all claims or debts against said fund accruing after the passage of this act shall be registered, as provided in section two of this act, within six months after the same shall accrue, and if not so registered shall be forever barred."

You will note that this section says that "All claims or debts against said fund accruing after the passage of this act shall be registered, as provided in section two of this act, within six months after the same shall accrue." Therefore, if such claims have to be registered within six months after their accrual, it naturally follows that they must be made out before the lapse of six months from their accrual, and if the claim be a claim of an officer for costs in cases where the State has failed, the case not prossed or abated by death, or where the case, based on an indictment, has been withdrawn and filed, the officer claiming such fees must, before it can be registered against the fine and forfeiture fund of your county, make out his claim and present it to the Commissioners' Court for allowance, as provided by Section 8 of said act, which is as follows:

"Sec. 8. **Be it further enacted,** That no officer's account for costs in any case shall become a claim against the fine and forfeiture fund of Cleburne County until it be itemized, sworn to, examined and allowed by the court of county commissioners."

Therefore, it follows that all claims of officers which are payable out of the fine and forfeiture fund of your county must be made out by such officer, presented to the Court of County Commissioners and allowed by such

Court, and registered by the Treasurer within six months after their accrual, or they are forever barred.

However, the above is not altogether true as to State witness fees chargeable against this fund. Such fees must be presented to the County Treasurer for registration within six months after their accrual, but do not have to be passed on by the Commissioners' Court, as witness claims are not included in the provisions of Section 8 of said act, *supra*. However, they must be presented for registration within six months, as is provided for all claims against this fund, under the provisions of Section 4 of said act, *supra*. Therefore, it is my opinion that all claims of officers must be made out, presented to the Court of County Commissioners and allowed as above stated, and registered within six months and that all witness claims issued by the Clerk against such fund of your county must be registered within six months from their accrual, or they are forever barred.—Opinions of Attorney General, Volume XXI, page 223, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 13, 1941.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Insane Hospitals—Commitments Thereto—Probate Judges—

Under the provisions of Section 210, Title 45, Code of Alabama, 1940, it is not necessary that notice to appear and defend be given by the probate judge to a person whose mental qualifications are under investigation in order to commit such person to a State Insane Hospital.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of August 8, 1941, follows:

"Please advise whether or not under Section 210, Title 45, Code 1940, it is necessary that notice to appear and defend should be given a person before such person is ordered committed to one of the State Insane Hospitals. It is not clear to me whether the sentence 'The right of such person to appear and defend shall not be denied' applies only to commitments to Veterans' Hospitals, or also to State Hospitals."

My answer to your question is in the negative.

The first time the words, "the right of such person to appear and defend shall not be denied," appeared in the statutory law of this State was in Act No. 240, S. 104, approved June 6, 1931 (General Acts, 1931, page 280), which act provided for the appointment of guardians for incompetent veterans and the commitment of veterans to the hospitals operated by the United States Veterans Administration or other agency of the United States Government.

Section 210, Title 45, Code 1940 finds its origin in Act No. 131, H. 266, approved March 10, 1939 (General Acts, 1939, page 172), which act amended Section 1444 of the Code of Alabama, 1923. It will be noted from a reading of this act and a reading of Section 1444 of the 1923 Code that it was amended by adding the paragraph which appears after the certificate required to be filed by the probate judge.

It will be further noted that the amendment to Section 1444 only deals with persons who are entitled to admission to hospitals operated by the United States Government. It is in this amendment that the words, "the right of such person to appear and defend shall not be denied" are found. In tracing the legislative history of Section 210, supra, it is my opinion that the purpose of this amendment was to effect legal transfers of patients who had been committed to some state institution for the insane to a veterans' hospital.

With this legislative history in mind, I am of the opinion that the added provisions to old Section 1444 of the 1923 Code, such section now appearing in the Code of 1940 as Section 210, Title 45, only apply to those persons who are entitled to admission to a hospital operated by the United States Veterans' Administration or other agency of the United States Government.

You are, therefore, advised that in my opinion it is not necessary for you to give notice to appear and defend to a person before such person is ordered committed to one of the State hospitals for the insane.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 13, 1941.

Hon. Bart B. Chamberlain,
Solicitor, 13th Judicial Circuit,
Mobile, Alabama.

Mobile County—Inquests—Witnesses—Costs and Fees.

No authority of law to pay witnesses at Coroner's inquest under general law.

Witnesses who appear at Coroner's inquest in Mobile County and testify held entitled to 50c per day. (Code 1940, Tit. 62, §83).

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter of July 29, 1941, in which you request my official opinion, is as follows:

"In Re: Coroner's Inquest—are witnesses summoned to testify at Coroner's Inquest entitled to witness fees as in other cases.

"Recently a Coroner's Inquest was held in this County to determine the cause of the death of a white man—D. B. Clark—as is authorized by the Statute. The inquest was duly had and a jury empaneled. Many witnesses testified before the Coroner in this matter. The Jurors were paid as they are paid in other cases. The question has arisen as to whether or not the witnesses who were duly summoned to appear and who did appear and testified are entitled to witness fees. Our County Treasurer states he finds no authority for him to pay the same.

"Will you be kind enough to write me a letter advising me as to whether or not, in your opinion, such witnesses are entitled to witness fees."

In reply, I wish to advise that I find no authority of general law to pay fees to witnesses testifying at a coroner's inquest.

However, I wish to call your attention to Section 82 of Title 62, Code of 1940, which provides as follows:

"ARTICLE 14. PROVISIONS OF LAW APPLICABLE TO MOBILE COUNTY. *** SUBDIVISION 3. CORONERS. *** §82. **Compensation of witnesses.**—Witnesses who appear and testify at inquests shall be entitled to fifty cents per day while in attendance at said inquests to be paid by the county treasurer out of the general fund of the county treasury on a certificate furnished by the coroner."

The last above quoted provision of law is applicable to Mobile County only and, under this provision, I wish to advise you that witnesses who legally render service at a Coroner's inquest in Mobile County shall be entitled to 50c per day while in attendance at said inquest, to be paid by the county treasurer from the general fund of the county.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 13, 1941.

Mrs. B. L. Cooper, Chairman,
Board of Registrars,
Montgomery County,
606 Norman Bridge Road,
Montgomery, Alabama.

Voters—Registrars—Compensation—

Members of Boards of Registrars held to become eligible for compensation for days served from date of oath of office, no commission being necessary.

Opinion by Assistant Attorney General.

Dear Mrs. Cooper:

Your letter of August 1, 1941, in which you request an official opinion, is as follows:

"Does a registrar's remuneration begin from the date of oath of office or date of commission? Also advise me as to whether or not a commission is necessary."

For convenience, I deem it advisable to reverse the order of your questions.

Your second question has been specifically answered in the negative by an opinion of the Attorney General reported in Quarterly Reports of Attorney General, Volume I, page 42 and Biennial Report of Attorney General, 1934-36, page 328.

Since this office has held that a commission is not necessary to the office of Registrar of voters, it must follow that the compensation of a member of the Board of Registrars is not influenced by the date of such commission, if in fact a commission is issued to said member.

The compensation of members of the Board of Registrars is fixed by Section 24 of Title 17, Code of 1940, as follows:

"§24. Fees, compensation of registrars.—Each registrar shall receive five dollars per day, to be paid by the state and disbursed by the several judges of probate, for each day's attendance upon the sessions of the board."

You will note that the compensation of members of the Board of Registrars is fixed upon a per diem basis and becomes due and payable for the days actually served.

It is, therefore, my opinion that a member of the Board of Registrars is entitled to be paid for each day actually served at the legal sessions of the Board of Registrars, as an official member thereof, without regard to the issuance of a commission. It must be understood, of course, that the oath of office is a necessary prerequisite of office before compensation may be paid, and a member of the Board of Registrars in my opinion becomes eligible to serve upon the sessions of the Board and receive compensation for this service upon appointment and subscription of the oath by said member. (See Section 25 of Title 17 of the Code of 1940.)

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 14, 1941.

Hon. Fred Grantham, Clerk,
Circuit and Inferior Courts,
Geneva County,
Geneva, Alabama.

1. The costs of witnesses in the Inferior Court of Geneva County must be presented to the clerk for payment within ninety days after payment of the costs in cases in which said certificates were issued. If this is not done, the fees shall revert to the county and shall be paid by the said clerk into the county treasury:

2. There is no authority of law for charging a trial tax of \$3.00 in each case that goes on the docket of the Inferior Court of Geneva County, nor for the \$5.00 trial fee provided for under Title 11, Section 87, Code of 1940, in the county court organized under the general laws of the state.

Opinion by the Attorney General.

Dear Sir:

Your letter of August 12, 1941, in which you request an official opinion, is as follows:

"Under Local Act No. 538, Local Acts of 1939, Page 329, creating the Inferior Court of Geneva County, it is provided that after 90 days from the date of collection thereof by the Clerk, witness fees become the property of the county. Under Title 11, Section 56, General Acts of 1940, it appears that a witness is entitled to present his witness certificate any time within three years from the date of collection of same by the Clerk and demand payment thereof. This is, therefore, to respectfully request your Opinion as to whether a witness fee collected in the Inferior Court of Geneva County becomes the property of the County after 90 days from the date of collection thereof by the Clerk, or whether

the witness fee can be legally collected by the witness within three years from the date of collection by the Clerk.

"Again referring to Local Act No. 538, Local Acts of 1939, Page 329, cannot a trial tax of \$3.00 be legally charged in each case entered on the Docket in the Inferior Court of Geneva County? If your answer is in the negative, can the \$5.00 County Court Fee be collected in Criminal Cases in the Inferior Court of Geneva County?"

In answer to your first inquiry, it is my opinion that the provisions of Act No. 538, H. 1009, approved September 16, 1939 (Local Acts, 1939, page 329), should govern your action in handling unclaimed witness fees in the Inferior Court of Geneva County.

The Code of 1940 does not repeal local legislation except in those instances where it is expressly done (Code of 1940, Title 1, Section 9). I find no such express repeal of Local Act No. 538, supra.

It is my opinion that a trial tax may not be legally charged in cases which are entered on the docket of the said court. Quarterly Report of Attorney General, Volume XV, page 274. There is no specific authority contained in the said local act for the collection of such a tax and the trial tax which is provided for by Section 20, Title 51, Code of 1940, is only applicable to cases which go on the docket of the Circuit Courts of this state. The trial tax so provided for must be distinguished from costs. The Supreme Court in the case of **State v. Montevallo Coal Mining Co.**, 197 So. 82, 87, has held to this effect. Therefore, that part of Section 5 of said local act which is hereafter set out is not authority for the collection of the said trial tax.

" *** It shall be the duty of the clerk to tax and collect in each civil and criminal case in said Inferior Court the same costs and fees for services of the Solicitor, the Clerk and the Sheriff and the witnesses as are now allowed by law to be assessed, charged and collected in the Circuit Courts of this state. *** "

It is also my opinion that there is no authority of law for you to collect the \$5.00 trial fee provided for by Section 87, Title 11, Code of 1940.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 14, 1941.

Hon. P. O. Davis, Director,
Extension Service,
Alabama Polytechnic Institute,
Auburn, Alabama.

**Soil Conservation Districts—Personal Property—Purchases—
Sales—**

1. The personal property of a soil conservation district which is continuing to function may be sold or disposed of by such method or manner as the supervisors of the district deem to be most advantageous to said district.

2. A soil conservation district may also purchase personal property by such method or manner as the supervisors of the district deem to be most advantageous to said district.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of August 9, 1941, is as follows:

"You are familiar with Act 147 of the last legislature which created soil conservation districts in Alabama. The legislation is contained in the Code of 1940 section 658-670 inclusive.

"The question has arisen as to sale of used equipment owned by a soil conservation district. One of the districts has certain old tractor equipment which could be sold to advantage and the proceeds therefrom used by the district in purchasing more modern equipment. What steps should the district supervisors take to dispose of this equipment? Will it be necessary to advertise sale in county newspapers? If so, how should the advertising be done? Will it be necessary to secure more than one bid in writing on this equipment?

"Will you please study the Code and Act with reference to this and give me an opinion as to method of sale of this property at your earliest convenience?"

Act No. 147, S. 66, approved March 18, 1939 (General Acts, 1939, page 202), provided for the creation, etc., of soil conservation districts. It is codified as Code 1940, Title 2, Chapter 6, Sections 658-670.

Section 659, which is the section containing definitions, provides in pertinent part:

"§ 659. **Definitions.**—Wherever used or referred to in this chapter, unless a different meaning clearly appears from the context: 'District'

or 'soil conservation district' means a governmental subdivision of this state, and a public body corporate and politic organized in accordance with the provisions of this chapter, for the purposes, with the powers, and subject to the restrictions hereafter set forth. 'Supervisor' means one of the members of the governing body of a district, appointed in accordance with the provisions of this chapter. *** "

Section 661 sets out the manner by which a soil conservation district may be created, and Section 662 provides for the appointment, qualifications and tenure of supervisors. Section 663 sets out the powers of the districts and supervisors and reads, as pertinent, as follows:

"§663. **Powers of districts and supervisors.**—A soil conservation district organized under the provisions of this chapter shall constitute a governmental subdivision of this state, and a public body corporate and politic, exercising public powers, and such district, and the supervisors thereof, shall have the following powers, in addition to others granted in other sections of this chapter: *** To obtain options upon and to acquire, by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, any property, real or personal, or rights or interests therein; to maintain, administer, and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; and to sell, lease, or otherwise dispose of any of its property or interests therein in furtherance of the purposes and the provisions of this chapter. *** No provisions with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to a district organized hereunder unless the legislature shall specifically so state. *** "

As can be seen from the above quoted excerpts from Title 2, Section 663, a soil conservation district may "sell, lease, or otherwise dispose of any of its property or interests therein in furtherance of the purposes and the provisions of this chapter." No particular method or manner for the sale or disposition of the property of a soil conservation district which is continuing to function as such is provided in said section, or elsewhere in the chapter (Chapter 6, *supra*) of which it is a part. Therefore, if there is any particular method or manner for the sale or disposition of such property, it must be found in other provisions of the statutory law of this state.

Since a soil conservation district is "a governmental subdivision of this state, and a public body corporate and politic" (Section 659, *supra*), it might be argued that the personal property of such a district should be sold or disposed of in accordance with the following provisions from Code 1940, Title 55, Section 145, dealing with the division of service of the Department of Finance:

"§145. **The division of service; the chief of service.**—There shall be in the department of finance the division of service, which shall be headed by and be under the direction, supervision and control of an officer who shall be designated the chief of service, to be appointed by the director of finance, with the approval of the governor. The functions and duties of the division of service shall be as follows: *** To sell, exchange or otherwise dispose of any personal property of the state determined by

the director of finance not to be needed for public use or to have become unsuited for such use. *** "

However, this deals with the personal property of the state generally, whereas, the above quoted excerpt from Title 2, Section 663, deals specifically with the property, including personal property, of a soil conservation district, and it is there provided:

"No provisions with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to a district organized hereunder unless the legislature shall specifically so state."

This, in my judgment, has the effect of making the above quoted excerpt from Title 55, Section 145, inapplicable to the sale or disposition of the personal property of a soil conservation district. This conclusion is in accordance with the well known rule of statutory construction that special provisions relating to special subjects control general provisions relating to general subjects, and that things specially treated will be considered as exceptions to general provisions. See *Herring v. Griffin*, 211 Ala. 225, 100 So. 202, and cases therein cited and quoted from.

Consequently, it is my opinion that the personal property of a soil conservation district which is continuing to function as such may be sold or disposed of by such method or manner as the supervisors of the district deem to be most advantageous to the district. The steps which the supervisors should take to sell or dispose of personal property of a district, the matter of advertising the sale in county newspapers, and the matter of securing bids in writing are all questions which address themselves to the discretion of the supervisors.

While you do not specifically request my opinion concerning the method or manner by which a soil conservation district may purchase or acquire personal property, I deem it advisable to also deal with this question, inasmuch as you state that the purpose of disposing of the personal property of the soil conservation district described in your letter of inquiry is to use the proceeds therefrom in purchasing other personal property.

The situation in regard to the purchase of personal property by a soil conservation district is the same as that in regard to the sale or disposition of the personal property of such district. The above quoted excerpts from Title 2, Section 663, authorize a soil conservation district to acquire personal property by purchase, etc., but no particular method or manner for the purchase of the same is provided in said section, or elsewhere in the chapter (Chapter 6, *supra*) of which it is a part. Yet, Code of 1940, Title 55, Section 108, dealing with the division of purchases and stores of the Department of Finance, provides in pertinent part:

"§108. **The division of purchases and stores; the purchasing agent.**—There shall be in the department of finance the division of purchases and stores, which shall be headed by and be under the direction, supervision and control of an officer, who shall be designated the purchasing agent, to be appointed by the director of finance, with the approval of the governor. The functions and duties of the division of purchases

and stores shall be as follows: To purchase all personal property, except alcoholic beverages (which shall continue to be purchased by the alcoholic beverage control board) for the state and each department, board, bureau, commission, agency, office and institution thereof. *** "

However, for the same reason, and on the basis of the same authorities that led me to the conclusion that the above quoted provisions from Title 55, Section 145, were not applicable to the sale or disposition of personal property of a soil conservation district, I am of the opinion that this excerpt from Title 55, Section 108, is not applicable to the purchase of personal property by a soil conservation district. Consequently, it is my opinion that a soil conservation district may purchase personal property by such method or manner as the supervisors of the district deem to be most advantageous to the district.

What has been said hereinabove as to the sale or disposition of the personal property of a soil conservation district is applicable when the district is continuing to function as such. As to the sale or disposition of the property of a soil conservation district which is discontinued in the manner provided by Title 2, Section 669, your attention is called to the fact that said section provides that the property (real and personal) of a soil conservation district, in such event, shall be sold at public auction and the proceeds of the sale covered into the state treasury. Said proviso also requires a full accounting for such properties and proceeds of sale in the application for the discontinuance of such district filed with the Secretary of State, as provided in said section.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 14, 1941.

Hon. Wm. A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Mobile County—Costs—Municipal Corporations—Appeals from Recorder's Court to Circuit Court—Code 1940, Title 62, §353.

1. In cases appealed from convictions in the Recorder's Court to the Circuit Court in Mobile County, under the circumstances stated in Code 1940, Title 62, §353, the Circuit Clerk's and Sheriff's costs may be taxed against the City of Mobile, and in cases of nonpayment thereof execution may be issued therefor. Constitution 1901, Amendments XXVIII and XLVII.

2. Execution can be levied however only on property or funds not used or useful for municipal governmental purposes. Code 1940, Title 7, §632.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of July 26, 1941 follows:

"Referring to Title 62, Paragraph 353, Page 147, of the Code of Alabama of 1940 I request Your Honor's opinion on the following questions, viz:

"1. Is or not said section in violation of the Constitution of Alabama requiring costs to be uniform throughout the state?

"2. Under said section would or not the City of Mobile be liable for the costs referred to in said section?

"3. If you hold that the City of Mobile is liable for the payment of the costs referred to in said section and the said City of Mobile declined to pay same is it or not the duty of the Clerk of the Circuit Court to issue execution against the City for said costs."

The effect of amendments to the Constitution of 1901, proclaimed ratified November 21, 1934 and November 15, 1940, as Amendments XXVIII and XLVII (Code, 1940, Vol. I, page 325; 1941 Cumulative Pocket Part, Vol. I, p. 8,) was to remove the costs, charges of court, fees, commissions, allowances or salaries to be charged or received by certain county officers of Mobile County, including the clerk of the Circuit Court and the sheriff of Mobile County from the constitutional requirements and inhibitions of Sections 96 and 104(24) of said Constitution. **Waldrop v. Henry**, 207 Ala. 128, 92 So. 425.

Accordingly, Code 1940, Title 62, §353, originally appearing as Act No. 250, H. 427, approved June 12, 1931 (Gen. Acts, 1931, p. 292), seems to be free from objection on constitutional grounds.

Section 353, *supra*, applies only to the 13th Judicial Circuit composed of Mobile County, and reads as follows:

"§353. Assessment and payment of clerk's and sheriff's costs.—The Clerk's and sheriff's costs arising from municipal cases in the circuit in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which the defendant had been convicted, and has been proved insolvent by the return of execution 'no property found,' or in cases in which the municipality enters a *nolle prosequi*, or where the complaint has been withdrawn and filed, or the prosecution abated by the death of the defendant, shall be taxed and assessed against, and shall be paid by such municipality."

In the absence of said statute, costs would not be taxable against the City of Mobile under the circumstances therein recited,—it being assumed as shown by the context, that the "municipal cases" therein referred to are appeals from convictions in the Recorder's Court of the City of Mobile for violation of its ordinances, as authorized by Code 1940, Title 37, §586. Inas-

much as said section 586 is silent as to taxation of costs against the city in such cases, they would not be taxable unless section 353, Title 62, *supra*, is sufficient authority for such procedure, to the extent of the clerk's and sheriff's costs. *City of Montgomery v. Foster*, 54 Ala. 62; *City of Selma v. Stewart*, 67 Ala. 338; *City of Birmingham v. O'Hearn*, 149 Ala. 307, 42 So. 836; 43 C. J. 488; Biennial Report of Attorney General 1926-28, page 208.

It is my opinion that you are authorized to tax the clerk's and sheriff's costs in such cases against the City of Mobile, and upon refusal of payment thereof, to issue execution therefor against the city as provided by Section 353, Title 62, *supra*.

Section 353, Title 62, above quoted, does not expressly authorize issue of execution against the city for collection of costs taxed against it in the cases therein mentioned. I am of opinion, however, that the power to issue execution can in this instance be implied on the authority of *Birmingham v. Rumsey*, 63 Ala. 352. In that case, it was held that where plaintiff had obtained a judgment against the city, execution would properly issue and that the lower court did not err in ordering execution to issue on the judgment although all public property used or useful for a governmental purpose was exempt from levy and sale under execution. The court observed that should the process be abused by a levy on property used for such public purposes, the law afforded the city ample remedy and means for arresting such unauthorized use of the execution. It may not be amiss in this connection to call attention to Code 1940, Title 7, §632, exempting from levy and sale under execution all property used for municipal purposes.

See also *Equitable Loan, etc. Co. v. Edwardsville*, 143 Ala. 182, 38 So. 1016; *Ellis v. Pratt City*, 111 Ala. 629, 20 So. 649; *Birmingham v. Rumsey*, *supra*, 23 C. J. 355.

If, however, you can find any property belonging to the City of Mobile which is not used or useful for governmental purposes, then such property would be subject to levy and sale under execution. *Murphree v. City of Mobile*, 108 Ala. 663, 18 So. 740. Quarterly Report, Attorney General Vol. XIV, p. 223.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 14, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Income Tax—Hospital Corporations—

Private corporation organized under laws of Alabama to operate a hospital, with capital stock and stockholders, not exempt from

reporting or paying state income tax imposed on Alabama corporations.—Code 1940, Title 51, Sections 398, 399.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated August 8, 1941, follows:

"In re: Citizens Hospital, Talladega, Alabama.

"The above named corporation, organized under the laws of the State of Alabama, filed income tax returns for 1938 and prior years since the inception of the law in 1933. However, when returns were requested for 1939 and 1940, the corporation, through its accountant, filed with this office copy of letter from the United States Commissioner of Internal Revenue, dated August 25, 1937, granting exemption from Federal income tax under the provisions of Section 101(6) of the Revenue Act of 1936, and holding that returns were not required for 1937 and subsequent years so long as the purposes and methods of operation were the same. There is attached copy of this letter, together with copies of Certificate of Incorporation and By-Laws in the form of minutes of the stockholders April 27, 1935.

"An official opinion is requested as to whether or not this corporation is exempt from State income tax, including the liability for filing returns, under any of the provisions of Section 399 of the Revenue Code."

According to its certificate of incorporation, the taxpayer above named, Citizens' Hospital, Inc., was incorporated under the general law of Alabama in 1925, "to conduct, operate and manage a hospital or infirmary for hire, and to do all things incident to operating, conducting, and managing a hospital or infirmary for hire: to treat or operate on sick patients for physical ailments and sickness, and to treat all diseases, to buy, compound, and sell drugs to conduct and operate a training school for nurses;" etc.

The certificate also recites that the operation "will maintain wards for charity patients and will give treatment to charity patients to the extent of at least 15% of the business of such (sic) hospital."

It further appears that this corporation has an authorized capital stock of \$35,000 divided into 350 shares of the par value of \$100 each, of which \$32,500 has been subscribed for, payable in cash.

So far as disclosed by the certificate of incorporation and by-laws adopted at a stockholders' meeting, the corporation is a private, domestic corporation of Alabama, appropriately organized to conduct a hospital and to declare dividends out of whatever profits may accrue from its operations.

The federal income tax law exempts from taxation thereunder certain corporations and organizations "organized and operated exclusively for re-

ligious, charitable, scientific, literary, or educational purposes *** no part of the net earnings of which inures to the benefit of any private shareholder or individual," etc. 26 U. S. C. A. §101(6).

Under this provision, apparently, on August 25, 1937, the corporation was granted exemption from payment of the Federal corporation income tax.

I find, however, no provision in the Alabama Income Tax Law for exemption of this corporation from payment of state income tax. Code 1940, Title 51, Sections 398, 399. Section 398 imposes the tax upon "every corporation organized under the laws of Alabama;" and Section 399 enumerates a number of "organizations" specifically exempt therefrom. Citizens' Hospital, Inc. does not, in my opinion, come within the purview of said Section 399, and is not, therefore, exempt either from reporting or paying the State income tax imposed by Section 398, supra, upon Alabama corporations.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 15, 1941.

Hon. H. G. Caudle,
Executive Assistant,
County Board of Education,
Jefferson County,
Birmingham, Alabama.

**Teachers Retirement System—Jefferson County—County Board
of Education—Teacher Tenure Act—**

1. County Board of Education of Jefferson County not authorized to augment retirement benefits of those teachers who have reached the age of seventy prior to September 1, 1941, from the school fund of the county so as to make their annual income equal to an amount they would have received had they not retired.

2. County Board of Education authorized to reduce salaries of teachers who have attained a continuing service status, provided such reduction does not bring the annual salary below the minimum salary schedule authorized by the Teacher Tenure Act (Code 1940, Title 52, Chapter 13).

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion date August 9, 1941 follows:

"The Board of Education of Jefferson County proposes to give all teachers who reach the age of 70 prior to September 1, 1941, the opportunity to retire, under the provisions of the Teachers' Retirement Act, Title 52, Chapter 14, Code of 1940, and the Teachers' Tenure Act, Title 52, Chapter 13, Code of 1940.

"In carrying out this plan, they propose as follows, and request your opinion as to the legality of the same:

"1. All teachers who reach the age of 70 prior to September 1, 1941, and who elect to retire, will have the amount they receive from the State Retirement Fund supplemented by the Board of Education in an amount sufficient to make their annual income until September 1, 1942, the same as the amount that they would receive on their present salary basis—all these teachers not being required to perform any teaching duties.

"2. All teachers who reach the age of 70 prior to September 1, 1941, and who do not elect to retire, will not receive their regular salary from the Board of Education, but will receive that amount to which they will be entitled as salary up to September 1, 1942, less the amount to which they would be entitled from the State Retirement Fund."

In answer to your first inquiry, I call your attention to Section 372, Title 52, Code of 1940, which reads as follows:

"§372. Limitation on membership.—No other provision of law in any other statute which provides wholly or partly at the expense of the State of Alabama or of any political subdivision thereof for pensions or retirement benefits for teachers of the said state, shall apply to members of the retirement system established by this chapter."

The effect of the above quoted code section is that, if any teacher participates in a retirement system under a local act, or a retirement system set up by a local board, then such teacher cannot participate in the State Retirement System, as set up by the Teachers' Retirement Act. This being true, you are advised that if your board sets up any local retirement system, and the teachers in the Jefferson County School System participate in such retirement system, then it is my opinion that they would not be entitled to participate in the State Retirement System set up by the Teachers' Retirement Act.

Moreover, I know of no authority which would authorize the County Board of Education of Jefferson County to expend its funds as outlined in your first question. A county board of education, as you know, is an administrative board created by the Legislature and has only the powers conferred upon it by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a "thus saith the law" for every disbursement.

Unless a given expenditure of such fund is expressly or impliedly authorized, such expenditure cannot be legally incurred. **Woodruff v. Beeland**, 220 Ala. 652, 127 So. 235.

As stated above, I find no authority of law for your county board of education to augment the benefits which the teachers of Jefferson County School System might receive under the Teachers' Retirement Act and you are, therefore, advised that in my opinion such expenditure would be illegal.

I assume that all of the teachers in your county school system who will arrive at the age of seventy prior to September 1, 1941, have attained a continuing service status as defined by Section 352 of Title 52, Code 1940.

Your second question does not address itself to the Teachers' Retirement Act. The plan outlined in your second question is a matter which addresses itself to the sound discretion of the County Board of Education of your county, subject to the restrictions and limitations of Section 354, Title 52, Code 1940, which reads as follows:

"§354. Change of compensation for succeeding year.—The salary or compensation of any teacher on continuing service status may be changed for any succeeding year to accord with a general salary schedule adopted by the employing board of education; provided, however, that no salary schedule shall operate to compensate teachers in less sums than the sums contained in a minimum salary schedule, which may be adopted by the state board of education of Alabama for teachers in the public schools of the state."

It will be noted from the above quoted section that the salary of a teacher, who has attained a continuing service status, may not be reduced except in accordance with the general salary schedule adopted by the county board of education, which schedule may not be less than the minimum salary schedule adopted by the State Board of Education.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 16, 1941.

Hon. Sam Morgan,
County Superintendent of Education,
Crenshaw County,
Luverne, Alabama.

Schools—Teacher Tenure Law—

The fact that a teacher on continuing service status is the mother of a child under one year of age does not, of itself, constitute a "good and just cause" for cancellation of the contract of employment under Code 1940, Title 52, Section 256.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion bearing date of August 15, 1941, is as follows:

"Several married teachers on continuing service status employed by the Crenshaw County Board of Education have given birth to children during the period from April 1 to August 1, 1941. The Board of Education desires that these teachers take a leave of absence for the succeeding school year because the Board does not believe that a teacher who is the mother of a young baby can give her best services to the children she teaches. We believe that her major interests will be outside of the schoolroom during the first year of her child's life and that she will not be physically able to perform the arduous duties of classroom teaching within the period of a year from the birth of her child.

"Section 361 of Title 52 of the Code of Alabama of 1940 provides as follows:

"'Leaves of absence for good cause may be granted to teachers by the employing board of education without the impairment of the tenure status of a teacher as provided for by this chapter; provided, further, that leaves of absence for advanced training, at the discretion of the employing board of education, may be counted as equivalent of teaching experience; provided, however, that no one leave of absence shall be for a period longer than one year.'

"Section 356 of Title 52 of the Code of Alabama of 1940 provides as follows:

"'Cancellation of an employment contract with a teacher on continuing service status may be made for incompetency, insubordination, neglect of duty, immorality, justifiable decrease in the number of teaching positions, or other good and just cause; but cancellation may not be made for political or personal reasons.'

"Your opinion is asked on the following question:

"If a teacher is the mother of a baby less than one year of age before the opening of school, and that teacher refuses to take a leave of absence for a year, which absence the Board is willing to grant, in your opinion does the Board of Education have 'a good and just cause' for the cancellation of the contract of that teacher under the provisions of Section 356, supra?"

In answer to your inquiry, it is my opinion that the fact that a teacher on continuing service status is the mother of a child less than a year old is not, of itself, a "good and just cause" for the cancellation of the contract of employment under Code 1940, Title 52, Section 356. However, if in any particular case, such a teacher fails to properly perform her duties, regardless of the reason, then a "good and just cause" for the cancellation of the contract might exist. This is a matter which addresses itself in each indi-

vidual case to the sound discretion of the employing county board of education, which discretion must not be unjust, unreasonable or arbitrary.

The Code of 1940, Title 52, Section 356, quoted in your letter of inquiry, enumerates the grounds for cancellation of a contract of employment of a teacher on a continuing service status. Neither marriage nor motherhood are among the causes so enumerated. It has been held that marriage, in itself, in the absence of a statutory provision to the contrary, does not constitute such "a good and just cause" for cancellation of a teacher's contract. *Elwood v. State ex rel Griffin* (Ind.), 180 N. E. 471. See also annotation in 81 A. L. R. 1033. In said annotation there appears the following:

"See also *People ex rel. Peixotto v. Board of Education* (1913) 82 Misc. 684, 144 N. Y. Supp. 87 (reversed in (1914) 160 App. Div. 557, 145 N. Y. Supp. 853, which is affirmed in (1914) 212 N. Y. 463, 106 N. E. 307), wherein it was held that the absence of a married female teacher during confinement was not such neglect of duty as would authorize her dismissal; at least, where a by-law of the board of education excused the absence of a teacher for serious personal illness. The court said: 'It is settled that the board of education is without authority to remove a female principal or teacher because of her marriage. This being so, it seems to me self-evident that the respondent cannot dismiss a married female principal or teacher because of the fact that she has given birth to a child. If she cannot be removed because of her marriage, she cannot be removed because of an act which is a natural incident of her marriage'."

Although the case from which the statement in the above-quoted excerpt is taken was reversed by the New York Court of Appeals, said statement was not challenged, the reversal being based on other grounds. The Court of Appeals commented on the fact that the length of time the teacher was absent from her duties might amount to a neglect of duty.

In view of the above, it is my judgment that the fact that a teacher on continuing service status is the mother of a child less than one year old does not, of itself, constitute a "good and just cause" for the cancellation of the contract of employment. No such penalty should be attached to motherhood.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 18, 1941

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Counties—Public Health—Courts of County Commissioners—

County governing body held authorized to appropriate money for purchase of "iron lung" for public use.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter of August 13, 1941, in which you request an official opinion, is as follows:

"There is a movement on foot in Clarke County to buy an iron lung for the benefit of the public of this county in order to combat infantile paralysis, which seems to be gaining headway through our country. We have several interested citizens who have contributed, and they say they are going to buy this iron lung if it has to be done on credit. The purpose of this letter is to find out whether or not under the law the county of Clarke could be authorized to make a donation out of the general fund towards the purchasing of said machine. Your prompt reply will be highly appreciated as it is very necessary that this matter be given immediate attention."

In reply, I wish to refer you to subsection 12 of Section 14 of Title 22 of the Code of 1940, which provides in pertinent part as follows:

"§14. Duties of county health officers prescribed.— *** (12) *** the court of county commissioners, or other like board, *** may in its discretion appropriate, from the revenues of the county, money for the prosecution of public health work which has been recommended by the county health officer and indorsed by the county board of health and approved by said court of county commissioners, or other like board. *** "

In my judgment, the Court of County Commissioners or the Board of Revenue of the county is authorized to appropriate money from the general fund of the county toward the purchase of an "iron lung" for the benefit of the public, if and when the purchase of the said "iron lung" has been recommended by the county health officer, indorsed by the county board of health, and approved by the Court of County Commissioners or Board of Revenue.

It is my opinion that the purchase of an "iron lung" under the circumstances outlined by you, and following the procedure outlined in the above quoted provisions of law, would constitute a legal appropriation of the county's funds to the work of preserving the public health.

Cf. Quarterly Report of Attorney General, Volume XIX, page 138; Quarterly Report of Attorney General, Volume XVII, page 249; Quarterly Report of Attorney General, Volume XIV, page 197; Quarterly Report of Attorney General, Volume XVIII, page 100.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 18, 1941.

Miss Cora Lee Speake,
Court Reporter,
Lawrence County Court,
Moulton, Alabama.

Lawrence County—Court Reporter of County Court—Deputy Tax Collector—

A person may at one and the same time hold the position of Court Reporter of Lawrence County Court and Deputy Tax Collector of Lawrence County.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of August 12, 1941 follows:

"I am the Court Reporter for the county court of Lawrence County under appointment by the Probate Judge as provided by Local Acts of Alabama 1931, page 61.

"Would it be illegal for me to hold that office and be appointed Deputy Tax Collector for Lawrence County when the pay for such Deputy Tax Collector would come from the Tax Collector?"

My answer to your inquiry is in the negative. The only inhibitions against a person holding two offices at one and the same time are Section 280 of the Constitution of Alabama of 1901 and Subsection 7 of Section 5 of Title 41 of the Code of 1940, which prohibit a person from holding two offices of profit under this State at one and the same time with certain exceptions not here material.

The office of Court Reporter of Lawrence County was created by Act No. 194, H. 419, approved May 20, 1931 (Local Acts, 1931, page 61). This, in my opinion, is not an office of profit under the provisions of Section 280, supra, or Subsection 7 of Section 5, supra.

I assume that you desire to be appointed Deputy Tax Collector under the provisions of Section 190, Title 51, Code of 1940. This section provides that the tax collector of each county may appoint a deputy tax collector, which deputy tax collector is nothing more nor less than an agent or clerk in the tax collector's office, and receives no compensation from the State or County. This office, in my opinion, is not an office of profit within the meaning of Section 280, supra, or Subsection 7 of Section 5, supra.

You are, therefore, advised that I know of no legal inhibition which would prohibit your holding both of the positions referred to in your request at one and the same time.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 20, 1941.

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Filing Tax—Mortgages—Municipal Corporation—Water Works Board—

Mortgage executed by water works board of a municipal corporation to secure bonded debt contracted in connection with the mortgaged property is exempt from payment of the mortgage filing tax (Code 1940, Title 51, §619) by virtue of Code 1940, Title 37, §267.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of August 15, 1941, follows:

"There has been filed in this office a mortgage executed by the Water Works Board of the City of Cullman for the sum of \$210,000.00. The attorneys filing this mortgage contend that we are not justified in charging a mortgage tax on the instrument and to support their contention cite Title 37, Section 400 of the 1940 Code which reads as follows:

"All such bonds and instruments as security, therefore, shall be exempt from all taxation to the laws of the State of Alabama."

"It is my judgment that this phrase applied to the bonds and security issued by the Water Works Board and is not applicable to the mortgage tax.

"I am herewith enclosing the original instrument for your inspection and would appreciate your advising me if the same is subject to the mortgage tax."

Code 1940, Title 37, §267, is as follows:

"§267. Mortgage of public property.—Any county or municipality of this state may mortgage any public property for the payment of any debt contracted in connection with such mortgaged property either originally or as a renewal, and such mortgage shall be admitted to record in the office of the probate judge of any county of this state without the payment of any tax upon the debt secured thereby, or any other fee or charge except the costs of recording the instrument at the rate fixed by law."

This statute originally appeared as Section 63 of Act No. 478, S. 193, approved September 10, 1927 (Gen. Acts, 1927, pp. 534, 550).

Subsequently by the Revenue Act of 1935, (Gen. Acts, 1935, pp. 256, 564, §368½) it was provided that:

"§368½. The exceptions and exemptions from license or privilege taxes levied by this Act which are granted by this Act, are hereby declared to be exclusive, and any laws or parts of laws general, local or special, granting or attempting to grant any exceptions or exemptions, except as specifically granted herein are specifically repealed."

This office therefore held in the first part of an opinion dated March 2, 1939, to Hon. J. Lee Smith, Judge of Probate, Chilton County, (Quarterly Report of Attorney General, Vol. XIV, p. 166) that Section 63 of the Act of September 10, 1927, *supra*, was repealed by Section 368½ of the Revenue Act of 1935, and that a mortgage executed by a water works board to secure its bonded debt was subject to the mortgage filing tax.

Section 368½ of the 1935 Revenue Act, so far as I can discover, has been omitted from the Code of 1940, and Section 63 of the Act of September 10, 1927, had been reenacted in said Code.

The result is that the mortgage indenture enclosed with your request executed July 1, 1941, by Water Works Board of the City of Cullman to Parker Bank & Trust Company as trustee for holders of bonds of the said water works board is, in my opinion, exempt from payment of the mortgage filing tax imposed by Code 1940, Title 51, §619, inasmuch as said board is a governmental agency of the City of Cullman, so far as I am advised, and it is assumed that the aforementioned bonded debt was "contracted in connection with such mortgaged property either originally or as a renewal." Quarterly Report of Attorney General, Vol. XIV, p. 166, *supra* (second part).

The first part of this opinion, although correct at the time it was written, is hereby modified to conform to the present statutory law in accordance with the above.

In view of this holding it unnecessary to consider the applicability of Section 400 of Title 37 of the Code of 1940, referred to in your letter, to the instant question.

The original instrument, enclosed in your request, is hereby being returned to you.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 22, 1941.

Hon. E. G. Pilcher, Chairman,
Board of Commissioners,
Housing Authority of the City of Attalla,
Attalla, Alabama.

Housing Authorities—Cooperation Between Authorities—

Under resolution of consent (examined and held sufficient), when funds earmarked for a low-cost housing project in the City of Attalla are released to the Housing Authority of the City of Attalla, such authority will have the legal right and jurisdiction to proceed to construct a low-cost housing project within the corporate limits of the City of Attalla, and when constructed will have the legal right and jurisdiction to maintain and operate such project within the corporate limits of the City of Attalla.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of August 19, 1941, is as follows:

"Since receiving from you your opinion set forth in a letter addressed to E. G. Pilcher, Chairman Board of Commissioners, Housing Authority of the City of Attalla, Alabama, dated July 28th, 1941, and which said opinion was in answer to our request under date of July 22nd, 1941, certain matters have arisen that make it necessary for us to request of you an additional official opinion.

"The Greater Gadsden Housing Authority has delivered to The Housing Authority of the City of Attalla, Alabama, a resolution adopted by the Greater Gadsden Housing Authority on the 18th day of August, 1941, which said resolution reads in words and figures as follows:

"R E S O L U T I O N

"WHEREAS, the Housing Authority of the City of Attalla has requested the Greater Gadsden Housing Authority to release its right of jurisdiction over that area included in the now corporate limits of the City of Attalla; and

"WHEREAS, the Housing Authority of the City of Attalla has ear-marking of certain funds with the United States Housing Authority for the construction of a low-cost housing project for the City of Attalla; and

"WHEREAS, the City of Attalla is within the jurisdiction of this Authority and the Housing Authority of the City of Attalla will not be able to use the funds that have been ear-marked for the low cost housing project in Attalla unless this Authority agrees to release that territory to the Housing Authority of the City of Attalla; and

"WHEREAS, the Greater Gadsden Housing Authority believes it to be the best interest of harmony and understanding between these two cities to enter into an agreement providing for the construction, operation and maintenance of said project by the Housing Authority of the City of Attalla.

"NOW, THEREFORE, be it resolved by the Greater Gadsden Housing Authority in this special meeting assembled, that the Greater Gadsden Housing Authority does hereby agree and consent that the Housing Authority of the City of Attalla, Alabama, be given the exclusive authority and power to construct, operate and maintain said low cost housing project for which funds have already been ear-marked, with all the rights and privileges under the laws of the State of Alabama, for the construction of said low cost housing project, for which funds have already been earmarked, in the area lying within the now corporate limits of the City of Attalla.

"BE IT FURTHER RESOLVED, that by this resolution the Greater Gadsden Housing Authority supersedes any and all previous action with regard to jurisdiction within the now corporate limits of the City of Attalla, insofar as said project for which funds have already been earmarked is concerned.

"BE IT FURTHER RESOLVED that by this resolution Greater Gadsden Housing Authority releases its control and authority over the area within the present corporate limits of the City of Attalla, Alabama, only to the extent of allowing the construction, operation, and maintenance by Housing Authority of the City of Attalla of said project for which funds have already been earmarked and except as herein specifically limited expressly reserves its authority and control over the area embraced within the present corporate limits of the City of Attalla, Alabama, and over any and all future housing projects within the area embraced within the present corporate limits of the City of Attalla, Alabama.

"BE IT FURTHER RESOLVED, that a copy of this resolution be forwarded to the United States Housing Authority, in Washington, and to the Housing Authority of the City of Attalla, Alabama.

"This resolution adopted this the 18th day of August, 1941, by unanimous consent, all members being present and voting aye.

"W. D. MCNAIR

ACTING CHAIRMAN GREATER GADSDEN
HOUSING AUTHORITY

"ATTESTED:

"J. B. HOLLINGSWORTH
SECRETARY.'

"For the benefit of the Housing Authority of Attalla we respectfully request of you your opinion answering the following questions:

"1—Is the resolution above set out sufficient to evidence the consent of the Greater Gadsden Housing Authority for The Housing Authority of the City of Attalla, Alabama, to construct, operate and maintain a housing project within the corporate limits of the City of Attalla, Alabama, with funds which have already been ear-marked by the United States Housing Authority for the construction of a low cost housing project in said City of Attalla, Alabama?

"2—When the funds heretofore earmarked for a low cost housing project in the City of Attalla are released to The Housing Authority of the City of Attalla will that Authority have the legal right and jurisdiction to proceed to construct a low cost housing project within the corporate limits of the City of Attalla, and when constructed will said Housing Authority have the legal right and jurisdiction to maintain and operate such project within the corporate limits of the City of Attalla, Alabama?"

I have carefully examined the above quoted resolution, and it is my opinion that it sufficiently evidences the consent sought to be given therein and meets fully the requirements of Code 1940, Title 25, Section 14, authorizing cooperation between authorities. This answers your first inquiry.

Your second inquiry is answered in the affirmative by the opinion rendered to Hon. John Brandon, Secretary of State, under date of April 22, 1941 (Quarterly Report of Attorney General, Vol. XXIII, page 85), copy of which is enclosed, and the opinion rendered to you under date of July 28, 1941.

You understand, of course, that, in the absence of any facts to the contrary appearing in your letter of inquiry, I have assumed that there has been no change in the legal status of the Housing Authority of the City of Attalla since the rendition of the opinion to Mr. Brandon, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 29, 1941.

Hon. A. C. Polk, Chairman,
Board of Registration for Professional Engineers and Land Surveyors,
1117 Webb Crawford Building,
Birmingham, Alabama.

Merit System—Engineers and Land Surveyor—

1. The Secretary of the State Board of Registration for Professional Engineers and Land Surveyors, being a member of the Board, is exempt from the provisions of the Merit System Law. Code 1940, Title 55, Sections 293-327.

2. The Board may appoint a confidential assistant who will be within the "Unclassified Service" in the State service.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of August 19, 1941, is as follows:

"The provisions of Act No. 271, generally known as the Engineers Registration Law, has been incorporated in the 1940 Code of Alabama, Titles 46-51.

"Section 135 of this Code reads in part as follows:

"ORGANIZATION AND MEETINGS OF THE BOARD— ***
The board shall elect or appoint annually the following OFFICERS:
A chairman, a vice-chairman, and a SECRETARY. (Emphasis supplied)

"Section 137 reads in part as follows:

"RECEIPTS AND DISBURSEMENTS— * The secretary of the board shall receive such salary as the board shall determine in ADDITION TO THE COMPENSATION AND EXPENSES PROVIDED FOR IN SECTION 133 OF THIS CHAPTER. The board may employ such clerical or other assistants as are necessary for the proper performance of its work,'**

"Since the organization of this Board we have annually elected a member to the office of Secretary, as provided for in Section 135, to perform the duties provided for in the provisions of the Act.

"Since October, 1938, the Secretary by authorization of this Board has employed an Assistant to the Secretary whose duty it is to handle the clerical and stenographic work in connection with the Secretary's office.

"The Board has directed that I write you for an Opinion on the following questions:

"1. Is the Secretary, being an Officer as defined in Section 135, whose compensation is fixed by the Board as provided for in Section 137, an employee of the State of Alabama and under the provisions of the Merit System, or being a Member of this Board and an Officer of the Board is he exempt from the provisions of the Merit System?

"2. Is the Assistant to the Secretary of this Board an employee of the State of Alabama, subject to the provisions of the Merit System and if so under what classification?

The provisions of the Merit System of Alabama, codified as Code 1940, Title 55, Sections 293-327, are, in my opinion, applicable to the State Board of Registration for Professional Engineers and Land Surveyors, which finds its authority under Code 1940, Title 46, Sections 129-150. Cf. Quarterly Report of Attorney General, Vol. XXI, page 122; Quarterly Report of Attorney General, Vol. XX, page 124; Quarterly Report of Attorney General, Vol. XIX, page 80.

The Merit System Act purports to include within its scope, with certain named exceptions, all officers and positions in the State service. Since the State Board of Registration for Professional Engineers and Land Surveyors is created by statute it would appear that its officers and employees are in the State service. Cf. *Jeffers v. Wharton*, 29 Ala. App. 428, 197 So. 352, Certiorari Granted, 240 Ala. 21, 197 So. 358; *State v. Stone*, 240 Ala. 677, 200 So. 756.

The provisions of Code 1940, Title 55, Sections 293, et seq., which will be hereinafter referred to as the Merit System Law, contain certain specific exemptions from its coverage. Numbered among these exemptions are "members of boards and commissions, whether appointed or self perpetuating, and heads of departments required by law to be appointed by the governor or by boards or commissions with the approval of the governor." Code 1940, Title 55, Section 301.

It is stated further in Section 301, with respect to such exempt services, that they "shall in no respect be subject to the provisions of this chapter, anything to the contrary notwithstanding."

It follows, therefore, that since the Secretary of the State Board of Registration for Professional Engineers and Land Surveyors is a member of the Board itself he would fall within the exempt service defined by Section 301, supra, and is consequently not subject to the provisions of the Merit System Law. Cf. Quarterly Report of Attorney General, Vol. XX, page 124, wherein it was concluded that "if the Secretary-Treasurer (appointed by the Board of Control under the Teachers' Retirement Act) were a member of the Board of Control he would come within the 'Exempt Service' *** "

In my opinion, the assistant to the Secretary of the Board is an employee of the State of Alabama, and is subject to the provisions of the Merit

System Law. Undoubtedly, the State Board of Registration for Professional Engineers and Land Surveyors has the right to appoint such a Secretary and such other assistants as it deems necessary for the proper performance of its work. Code 1940, Title 46, Section 137.

The Board may also designate "one confidential assistant or secretary." Code 1940, Title 55, Section 301. Such an assistant or secretary so appointed falls into the Unclassified Service. Employees in this service are "subject to the same rules and regulations of employment as apply to employees in the classified service except as to appointment and dismissal." Code 1940, Title 55, Section 301.

It therefore follows that when the Board has appointed a confidential assistant such assistant will be subject to the Merit System Law insofar as other employees in the Unclassified Service are subject thereto. You are cautioned, however, that unless the assistant is appointed a confidential assistant or secretary by the Board he will not fall within the Classified Service and subject to all the provisions of the Merit System Law. Cf. Quarterly Report of Attorney General, Vol. XX, page 124.

I think it well to here point out that the mere fact that the Board's given authority to employ is clerical or other assistants does not operate of itself to remove these clerical or other assistants from the operation of the Merit System Law. Sections of the Code adopted together must be so construed as to give all a field of operation—they must be construed in *pari materia*. *Jefferson County v. City of Birmingham*, 221 Ala. 476, 129 So. 48; *Hatchett v. Billingslea*, 65 Ala. 16.

Therefore, in the absence of specific language indicating a contrary intention, it must be presumed that the legislature contemplated that the employment of such clerical or other assistants by the Board would be in accordance with the provisions of law applicable to the maintenance of a Merit System, enacted at the same time as a part of the same codification.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 29, 1941.

Hon. W. A. Dozier,
Acting Chairman, County Commission, Russell County,
P. O. Box 573,
Phenix City, Alabama.

Counties—Employment of Attorney—Contracts—

Court of County Commissioners is not authorized to enter into a contract, and pay such sums as stipulated in the contract, with a person, firm or corporation whereby such person, firm or corporation

agrees to employ an attorney and file a test suit to determine the validity of warrants to be issued by a county against the gasoline tax fund.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of August 21, 1941, follows:

"After May 31, 1941, the County Commission of Russell County entered into a contract with Burford-Toothaker Tractor Company for the purchase of \$40,000.00 of road machinery. Said contract prescribes that the purchase price of said machinery was to be paid by the County Commission of Russell County on or before September 21, 1941.

"It was the desire of the Russell County Commission to refinance this obligation by the issuance of Gasoline Tax Anticipation Warrants, but as you know, due to the alterations made in the County Financial Contract Act, Chapter 6 of Title 12, Code of Alabama, 1940, the Bond Attorneys have refused to approve the validity of such securities.

"Under date of August 1, 1941, the County Commission of Russell County entered into a contract with Roy Gridley and Company, in which the County of Russell agreed to pay said Roy Gridley and Company the sum of \$400.00 if a test suit was filed by said Roy Gridley and Company with the Supreme Court of Alabama. Said sum of \$400.00 is to be paid to Roy Gridley and Company within fifteen days after a decision is rendered by the Supreme Court whether said holding is favorable or unfavorable to the issuance of said Gasoline Tax Warrants. I am enclosing herewith a copy of said contract for your information.

"I respectfully request your official opinion as to whether or not the County of Russell can legally pay the sum stipulated in said contract.

"Due to the fact that this matter must be determined immediately, I shall appreciate your prompt attention to the same."

My answer to your inquiry is in the negative.

The contract mentioned and referred to in your letter is as follows:

"STATE OF ALABAMA,
RUSSELL COUNTY.

"This contract made and entered into by Russell County, Alabama, acting by and through the County Commission and Roy Gridley and Company.

"WITNESSETH: It is agreed between the parties hereto that should Roy Gridley and Company file a test suit and secure a decision by the Supreme Court of Alabama validating Gasoline Tax Warrants that Rus-

sell County will pay Roy Gridley and Company the sum of Four Hundred (\$400.00) Dollars within fifteen days after said decision is obtained whether by the terms of said decision, by said court said Gasoline Tax Warrants are validated or not.

"That this contract is subject to the extension of that certain contract now existing between Burford-Toothaker Tractor and Russell County, Alabama, for they payment of certain machinery which Russell County has purchased from said tractor company.

"Roy Gridley and Company agrees to notify Russell County not later than August 20, 1941, whether or not said extension has been granted to Russell County, and in the event the same is granted by the tractor company, the tractor company acting by and through an authorized tractor company, shall notify Russell County by its actions.

"Roy Gridley and Company agrees to obtain the services of Bradley, Baldwin, All, and White to file said test suit and in the event the services of said law firm is not obtained then Russell County shall not be liable for the payment of the sum herein before mentioned.

"In witness whereof Russell County acting through the County Commission and Roy Gridley and Company acting through Virgil Lyde this the 1st day of August, 1941.

Russell County by Sgn. B. L. Cole

Sgn. J. B. Parkmon

Sgn. W. A. Dozier

Sgn.

Roy Gridley and Co.

by Virgil Lyde."

It appears from the above contract that Russell County agrees to pay Roy Gridley and Company the sum of \$400, in consideration for Roy Gridley and Company's employing and obtaining the services of the law firm of Bradley, Baldwin, All, and White, to file a test suit for the purpose of determining whether or not a county can issue anticipating warrants against the county gasoline tax fund.

The authority for counties to employ an attorney is found in subsection 8 of Section 229, Title 13, Code of Alabama, 1940, which, after requiring certain duties on the part of solicitors, further provides as follows:

"But courts of county commissioners or boards of revenue may retain or employ attorneys when it is deemed advisable or necessary, and the **agreed compensation** to them may be paid as are claims to grand and petit jurors."

This provision was considered and interpreted in the case of **Clark v. Eagerton**, 207 Ala. 491, 93 So. 455, wherein it was held that the effect of the above provision was to extend the power or authority beyond that which previously existed, and that courts of county commissioners or other like governing bodies of a county had the authority to employ and pay counsel for their services at their discretion, when deemed advisable or necessary in the "administration of county affairs." This, in my opinion, means that courts of county commissioners or other like governing bodies of a county are empowered to employ counsel to look after all suits wherein the county may be interested, or to advise them as to legal questions arising out of the discharge of their duties under the laws existing at the time the services are rendered. However, I do not believe that this section is broad enough to authorize a county to enter into a contract with another person, whereby such person himself agrees to employ counsel to file a test suit upon a question in which the county might or might not be interested. **Stone v. State**, 220 Ala. 437, 125 So. 653; Cf. Quarterly Report of Attorney General, Vol. XXII, page 170.

It will be noted from the above quoted code section that courts of county commissioners or boards of revenue may retain or employ counsel, and agree upon the compensation to be paid such counsel.

From aught that appears from the above quoted contract, Roy Gridley and Company does not agree to pay the law firm of Bradley, Baldwin, All, and White any sum or amount out of the \$400.00 stipulated in said contract to be paid to Roy Gridley and Company by Russell County. I do not believe that it was the intention of the Legislature to allow the governing body of a county to contract with individuals whereby such individuals agree to employ an attorney to render a service to the county. In other words, my interpretation of the above quoted subsection 8 of Section 229, supra, is that the county itself must contract directly with an attorney to represent the county, and the county itself must further agree with said attorney upon the compensation to be paid for the services rendered.

The premises considered, you are advised that in my opinion your county may not legally enter into the contract hereinabove set out nor may it legally pay the sum stipulated therein.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 30, 1941.

Mrs. Edna N. Dunn,
Judge of Probate,
Conecuh County,
Evergreen, Ala.

Corporations—Fees—Probate Judges—

Fees to be collected by the probate judge when corporations are organized under Code 1940, Title 10, Chapter 1, Article 9, Section 168 and Code 1940, Title 2, Chapter 1, Article 9, subdivision 3, Sections 115-133.

Opinion by Assistant Attorney General Screws.

Dear Madam:

Your request for official opinion dated August 22, 1941 follows:

"Enclosed, herewith, you will find a mimeographed copy of a Declaration of Incorporation Blank. We have an application for the filing of the within corporation of the Conecuh County Purchasing and Marketing Association organized under Title 10, Section 168 and Article 9 of the Code of Alabama, 1940. Please give us an official opinion of all charges and fees that we must collect before admitting the same for record."

In answer to your inquiry, it is my opinion that in a case where a corporation is properly organized under the provisions of Code 1940, Title 10, Chapter 1, Article 9, Section 168, the proper fees which you should collect are as follows: Fifteen cents for each one hundred words for recording the Declaration of Incorporation in most instances. However, if the corporation be a religious, educational, benevolent or a burial society, then the fee for filing and recording is \$2.00. (Biennial Report, Attorney General, 1936-38, page 624.) You are also entitled to a fee of \$1.00 for issuing the certificate or charter.—Code 1940, Title 11, Section 29.

The provisions of Sections 5, 6 and 11 of Title 10 of the Code of 1940, and the fees provided for therein, are applicable only to private corporations of a business nature, incorporated under Article 1, Sections 1-16, of Title 10, supra, and have no application to corporations organized under Article 9, Section 168, supra,—Biennial Report, Attorney General, 1934-36, page 123; Biennial Report, Attorney General, 1920-22, page 130.

I am informed by representatives of the Farm Security Administration, which agency is sponsoring the organization of the corporation in question, that the present method of incorporation will be abandoned and the certificate withdrawn, and that the corporation in question will be organized under the provisions of Code 1940, Title 2, Chapter 1, Article 9, subdivision 3, Sections 115-133. In this event the fees which you should collect are those specifically enumerated in Section 132 of Title 2, supra, viz.: \$10.00, \$5.00 of

which is to be retained by you and the other \$5.00 to be forwarded to the Secretary of State, and also the fee of \$1.00 for issuing the certificate or charter under Section 29 of Title 11, supra. See Quarterly Reports, Attorney General, Vol. IV, page 54; Vol. VI, page 153.

The former opinions of this office, which deal with the organization of corporations not of a business character, fail to take cognizance of the \$1.00 fee to which the judge of probate is entitled for issuing the certificate or charter to private corporations. In my judgment, this fee is applicable to those corporations enumerated above although they are not of a business character. They are, in my judgment, private corporations as distinguished from public corporations, and the judge of probate is entitled to the \$1.00 fee in question. All former opinions are hereby modified to conform to this holding.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 2, 1941.

Hon. T. R. Snead, Chairman,
Cherokee County Board of Revenue,
Centre, Alabama.

**Tennessee Valley Authority—Payments to Counties—16 U. S. C.
A., §831L.**

1. Payments to counties by the Tennessee Valley Authority under Section 13, as amended, of the Tennessee Valley Authority Act, are not subject to division with the State of Alabama.

2. Such payments shall be covered directly into the county treasury without intervention of the tax collector.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of August 27, 1941, follows:

"We have received a check in the sum of \$27.21 from the Tennessee Valley Authority being the first monthly installment in lieu of taxation for the new fiscal year to Cherokee County, as provided by Section 13 of the TVA Act. I quote below the letter we received from Tennessee Valley Authority dated July 30th 1941:

"Chairman of County Commissioners,
Cherokee County,
Centre, Alabama.

"Dear Sirs:

"The Tennessee Valley Authority will make its first payment in lieu of taxation for the new fiscal year to your County not later than July 31, 1941, as provided by Section 13 of the TVA Act. The annual payment, to be divided into twelve monthly installments, will be equal to the two-year average of ad valorem taxes formerly levied by the County including taxes levied by taxing districts within the County, against power property purchased by the Authority from the Alabama Power Company on July 18th, 1940, and held and operated by the TVA as of June 30, 1941. The two year average will be calculated for the last two tax years during which the property in question was owned by the power company.

"Payments for the first few months will be made on the basis of preliminary estimates of the amount due. Work has already started on the final calculation of the payments due, and as soon as the amount is determined and approved by the Board of Directors of the Authority, adjustment for the preliminary payments will be made as necessary.

"As soon as possible, detailed schedule will be supplied to your County showing the basis and method of computation of the payments due by the TVA in lieu of taxes.

Yours very truly,

TENNESSEE VALLEY AUTHORITY

(s) Gordon R. Clapp, General Manager.'

"The checks are made payable to 'Cherokee County—c/o County Commissioners, Centre, Alabama,' and the question is the correct way to clear these checks through our records.

"Should these checks be turned over to the Tax Collector and he in turn disburse same to the different departments the same as ad valorem taxes collected by him? Does the State participate in these payments the same as other ad valorem tax collections?"

Section 13 of the Tennessee Valley Authority Act, as amended (16 U. S. C. A. §831L), reads in part as follows:

"In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross pro-

ceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power operations of the Corporation.

* * * * *

The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchise and income, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

* * * * *

"Provided further, That the corporation shall pay directly to the respective counties the two-year average of county ad valorem property taxes (including taxes levied by taking districts within the respective counties) upon power property and reservoir lands allocable to **power, determined as above provided,** and all payments to any such county within a State shall be deducted from the payment otherwise due to such State under the provisions of this section.

* * * * *

"The payments above provided shall in each case be made to the State or county in equal monthly installments beginning not later than July 31, 1940.

It is apparent, therefore, that payments to the State and the counties pursuant to this statute are made separately, and that no part of any payment to a county is subject to division with the State, as in case of State ad valorem taxes collected by the tax collector of the county.

It is apparent, also, that such payments to counties are made to indemnify against loss of revenue arising from acquisition by the authority of property previously subject to taxation in the counties, and that such payments are made impliedly upon condition that they will be accepted and used to all intents and purposes the same as it made in payment of taxes levied and assessed by the counties. In other words, such payments should be treated as if collected by the county tax collector for the benefit of the counties and school districts.

In my opinion, therefore, such checks should be endorsed in the name of the payee of the county treasury and handled in the same manner as payments collected by the tax collector, and should be noted in the books and records of the treasury as payments by Tennessee Valley Authority under Section 13 of the Tennessee Valley Authority Act. The county governing body, by proper resolution and by warrants issued and signed by the chairman thereof, will then make distribution of said fund in the same manner that the tax collector would make in case of taxes paid for the use of the county and the various school districts therein.

These checks should not, however, in my opinion, be turned over or delivered to the tax collector. They represent payments, not to the tax col-

lector, nor taxes, but to the county itself. They are, strictly speaking, in no sense payments of taxes; rather they are donations or "grants" by grace of the Federal Government, through one of its agencies, but upon the implied condition that they are used and "allocated" as if they had been made for taxes.

The answer to your other question is no. Separate payments are to be made directly to the State for its loss of taxes, as plainly indicated by the Federal statute.

I have been unable to find any provision of statutory law in Alabama with reference to this matter, and am informed by Hon. John C. Curry, Commissioner of Revenue, that there is no such statutory provision. It has become necessary, therefore, to resolve this question, as best I may, upon application of principle and reason.

You are therefore advised:

1. Payments to counties by the Tennessee Valley Authority under Section 13, as amended, of the Tennessee Valley Authority Act, are not subject to division with the State of Alabama.

2. Such payments shall be covered directly into the county treasury without intervention of the tax collector.

In this connection, I quote from a letter in this office from Hon. B. P. Singleton, Chief Examiner of Accounts, promulgating a rule as to the handling of these funds, as follows:

"The counties not having any precedent to follow as to the handling of such funds, under the authority vested in me as Chief Examiner of Public Accounts and under the authority of the Uniform Accounting Act, I, herewith, promulgate the rule that such funds received from the Tennessee Valley Authority shall be deposited in a special account, designated Tennessee Valley Authority—Special Account. The governing bodies will need to open a special fund account in their ledgers. The receipt or receipts of such fund or funds shall be shown in their cash receipts journal and duly posted to this Tennessee Valley Authority—Special Account, in their ledgers.

"After the receipt of such a donation from the Tennessee Valley Authority the county should then determine the amount belonging to the separate governmental agencies, districts or funds represented in the total amount received and should issue its warrants against the Special Account to these various funds and agencies for their pro rata share."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 4, 1941

Hon. W. E. Mauldin,
Superintendent of Education,
Winston County,
Double Springs, Alabama.

Military Leave—Civilian Conservation Corps—Code 1940, Title 35, Section 12—

Reserve Officer assigned to Civilian Conservation Corps camp entitled to military leave.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of August 19, 1941, is as follows:

"Does the 21 day Military leave pay apply to the Lieut. in the Reserves who takes over as Commander of a C. C. C. Camp?"

It is my opinion that your inquiry must be answered in the affirmative.

The statutes relating to the Civilian Conservation Corps are set out in Chapter 3 of Title 16 of U. S. C. A. Section 584e of Title 16 provides as follows:

"§584e. Service of other officers with Corps

"The President may order Reserve officers of the Army and officers of the Naval and Marine Reserves and Warrant officers of the Coast Guard to active duty with the Corps under the provisions of Section 369 of Title 10, and the act of February 28, 1925, respectively. June 28, 1937, c. 383, §6, 50 Stat. 320."

It is apparent from the above quoted section that when a Reserve officer is called to duty with a Civilian Conservation Corps camp he assumes this duty as an Army officer.

Title 35, Section 12, of the Code of Alabama, 1940, specifies the employees entitled to such a leave of absence, and also specifies the type of service that they must render in order to be entitled to this leave of absence. This section is as follows:

"§12. Military leave for government employees.—All officers and employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, who shall be active mem-

bers of the Alabama national guard or naval militia, or of the officer's reserve corps of the United States Army, or of the United States naval reserves, shall be entitled to military or naval leave of absence from their respective civil duties and occupations on all days that they shall be engaged in field or coast defense or other training or on other service ordered under the provisions of this chapter, or of the national defense act, or of the federal laws governing the United States naval reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave, but such person granted such leave or absence with pay shall be paid for more than twenty-one working days at any one time." (Emphasis supplied)

It is my opinion that a Reserve Officer of the United States Army who is called to duty and assigned to a Civilian Conservation Corps camp comes within the purview of Title 35, Section 12, supra, and is entitled to the leave of absence provided therein, and is also entitled to twenty-one working days pay from the time he leaves his employment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 6, 1941.

Hon. W. D. Partlow, Supt.
The Alabama State Hospitals, and
The Partlow State School,
Tuscaloosa, Alabama.

Alabama Insane Hospitals—Insane Persons—Nonresident—Commitment to Hospitals—

A probate judge may not commit a nonresident of the State of Alabama to the Alabama Insane Hospitals.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated August 29, 1941, follows:

"Will you kindly give me your opinion, as Attorney General, as to whether the Judge of Probate of any county in Alabama, acting under the provisions of Sections 1442, 1443 and 1444 of the Code of Alabama of 1923, or any other provision of law in Alabama, is authorized to commit to The Alabama Insane Hospitals an alien, nonresident for temporary detention by the Hospitals pending deportation proceedings of such alien or foreigner?

"The above concerns an alien of Mobile County with deportation proceedings pending. Judge Norvelle R. Leigh, Jr., Judge of Probate of Mobile County has requested that I obtain your opinion on the above question."

My answer to your inquiry is in the negative.

It appears from the statement of facts contained in your letter that the person here considered is a nonresident of the State of Alabama. In this connection, I call your attention to Section 210 of Title 45, Code of Alabama, 1940, (Section 1444, Code of Alabama, 1923), which section contains a form of certificate to be made by the probate judge in committing persons to the Alabama Insane Hospitals. It appears from the certificate set out in said section that the probate judge must certify that such person is a resident of the county from which he is committed.

Your attention is also called to Section 220 of Title 45, Code of Alabama, 1940, which deals with the authority of the probate judge of Tuscaloosa County to commit a person who is a resident of another county in the State who does not have the proper commitment certificate from the probate judge of the county of his residence.

As the person here considered is a nonresident of the State of Alabama, it is my opinion that no probate judge in the State may commit him to the Alabama Insane Hospitals.

Nothing hereinabove should be construed as holding that a probate judge may not commit an alien, who is a bona fide resident of the State of Alabama, to the Alabama Insane Hospitals. Under your statement of facts, that question is not presented.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 8, 1941.

Hon. T. B. Pearson,
County Superintendent of Education,
Washington County,
Chatom, Alabama.

Schools—Teacher Tenure Law—

1. A resolution of a County Board of Education that no teacher be employed for the 1941-42 term who becomes a mother, or is an expectant mother during the calendar year 1941, is valid as to teachers not on a continuing service status but invalid as to teachers on a continuing service status.

2. A resignation of a teacher on continuing service status made solely because of such resolution may be rescinded.

Opinion by Assistant Attorney General Screws:

Dear Sir:

Your request for official opinion bearing date of September 4, 1941, is as follows:

"The following resolution was passed by the Washington County Board of Education: (March 24, 1941)

"BE IT RESOLVED, That no woman teacher be employed by the Washington County Board of Education for the 1941-42 term who becomes a mother, or is an expectant mother during the calendar year 1941.

"BE IT FURTHER RESOLVED, That T. B. Pearson, Superintendent of Education of Washington County, is hereby instructed to notify every woman teacher in the county in writing of the action taken by the Washington County Board of Education on this day.'

"A copy of said resolution was sent to every woman teacher in the county before the close of schools and before May 1, 1941. Please advise if the action by the Washington County Board of Education was a legal procedure. Also give us your opinion in regard to the following which is in connection with this matter.

"1. Mrs. A, a teacher **not** on continuing service status, who was effected by the above resolution and who recently read your opinion in the Crenshaw County case, now requests that she be given a contract for the 1941-42 term. Likewise we have a similar request from Mrs. B who was on continuing service status at the time the above resolution was passed. Is the Washington County Board of Education legally bound to give either or both of the above teachers a teaching contract for the 1941-42 session.

"2. We have had several letters during the summer from teachers who stated substantially as follows: 'on account of my health I am having to resign my teaching position for the 1941-42 term. Please accept by resignation.' In the event you should rule that the resolution stated in the premises is illegal, could these teachers come before the board and state that had they known that the resolution was illegal they would not have resigned and on this basis demand a teaching position for 1941-42? Would the board be legally bound to give them employment or would the letter of resignation release the board from any further obligation?

"I would appreciate an immediate reply to this letter, as our schools open on September 8 and it would be of great benefit to us if you could give us your opinion before that date."

Rather than answer your inquiries categorically, it is deemed advisable to discuss the matters presented generally, which discussion will give the information desired. This is for the reason that the answers will be different as to those teachers not on continuing service status and those on such status.

As to those teachers not on a continuing service status, the contract of employment could be terminated without cause upon the proper notice required by Code 1940, Title 52, Section 360. Cf. Quarterly Report of Attorney General, Vol. XXI, page 181. It therefore follows that the resolution in question is valid insofar as it affects those teachers not on a continuing service status. Such teachers (not on continuing service status) would not be entitled to a teaching contract for the year 1941-42, if they were properly notified as to the termination of their contract under Section 360, *supra*. Cf. **Board of Education of Marshall Co. v. Baugh**, 240 Ala. 391, 199 So. 822.

If such a teacher (not on continuing service status) unconditionally resigned because of the resolution, the resignation cannot now be withdrawn or rescinded. **State v. Fowler**, 160 Ala. 186, 48 So. 985.

However, the situation is different as to those teachers on a continuing service status. Code 1940, Title 52, Sections 353 and 356, provides as follows:

“§353. Contract of employment effective until superseded or cancelled.—The contract of employment of any teacher who shall attain continuing service status shall remain in full force and effect unless superseded by a new contract signed by both parties, or cancelled as provided that the legislature, or in the absence of legislation, the employing board of education may provide for the retirement of teachers at certain ages.”

§356. Grounds for cancellation of employment contract.—Cancellation of an employment contract with a teacher on continuing service status may be made for incompetency, insubordination, neglect of duty, immorality, justifiable decrease in the number of teaching positions, or other good and just cause; but cancellation may not be made for political or personal reasons.”

This office is committed to the view that neither marriage nor motherhood, of themselves, constitute a “good and just cause” for the cancellation of a contract of a teacher, who is on a continuing service status, under Section 356, *supra*.—Opinion of Attorney General to County Superintendent of Education of Crenshaw County under date of August 16, 1941 (copy enclosed). Cf. 81 A. L. R. 1033, 118 A. L. R. 1092. The resolution in question is, in my opinion, invalid insofar as it affects teachers on a continuing service status. Therefore, the teaching contract of such teacher (on continuing service status) could not be cancelled merely because of the fact that they fall within the provisions of the resolution.

If a teacher on a continuing service status resigned solely because of the resolution in question, and this fact can be established, it is my opinion that such resignation may now be rescinded and the teacher placed in status quo. It is true that an unconditional resignation cannot later be withdrawn or rescinded. *State v. Fowler*, supra. However, to constitute a complete and operative resignation, there must be an intention to relinquish the term, accompanied by the act of relinquishment. A resignation given solely because of the resolution in question, which is invalid as to a teacher on continuing service status, cannot be said to have been given by such teacher of her own free will. Such resignation was made because of circumstances at least tantamount to coercion, if not duress, and may be repudiated. *People v. Harding*, 224 Ill. App. 198; *State ex rel Young v. Ladeen*, 104 Minn. 252, 116 N. W. 486. If the invalidity of the resolution had been known to the party resigned solely on account of same, it is natural to presume that the resignation would not have been made merely because the party happened to fall within its terms.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 9, 1941.

Hon. J. W. Brock,
Judge of Probate,
Coffee County,
Elba, Alabama.

Municipalities—Elections—

In an election for the annexation and extension of the limits and boundaries of municipalities in general only those qualified electors, who have resided within the territory sought to be annexed for three months next preceding the election, are entitled to vote in said election. (Code 1940, Title 37, Sections 134-137.)

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion bearing date of September 3, 1940 is as follows:

"I have information to the effect that the City expects to begin proceedings to extend its corporate limits by annexing certain territory contiguous to its present boundary. The city expects to proceed under the provisions contained in Chapter 5, Title 37 of the Code of Alabama 1940, which will impose the duty upon me, as probate judge of Coffee County, Alabama, to take such action in the matter as the law pro-

vides. In that connection, I would like to have you give me your opinion in answer to questions as follows:

"1. Under the provisions of Chapter 5, Title 37, Code of Alabama 1940, would persons who are qualified electors, and who own property within the territory purposed to be annexed, but who do not reside therein, be entitled to vote in the election to determine whether or not said territory should be annexed?

"2. Would a person who is not a qualified elector, but who owns property in the territory proposed to be annexed, and who resides in the said territory, be permitted to vote in the election?

"3. Would a person who is a qualified elector and who resides in the territory proposed to be annexed, but who owns no property therein, be permitted to vote in such election?"

I am of the opinion that your first two inquiries should be answered in the negative and your third in the affirmative.

Code of 1940, Title 37, Chapter 5, Article 1 (Sections 134-137) provides for the annexation and extension of the limits and boundaries of cities and towns in general. This article is applicable to the annexation under consideration. The portions of said article pertinent to the specific inquiries presented are Subsections (1)-(4) of Section 135, which provide as follows:

"§135. **Election for extending boundaries, and annexation.**—Whenever the council shall pass a resolution to the effect that the public health or public good requires that certain territory (described it) shall be brought within the limits of the city or town:

"(1) It shall be the duty of the mayor to certify a copy of such resolution to the judge of probate of the county in which the land is situated proposed to be annexed, and said certified resolution shall have attached thereto a plat or map of said territory, which certified resolution and plat or map shall be filed by the judge of probate.

"(2) Within ten days from the date of the filing of such resolution, the judge of probate must make and enter an order upon the minutes of said court, directing and ordering an election to be held by the qualified electors residing within the territory described, not less than twenty days nor more than forty days from the date of the making of the order. The said judge shall give notice of the holding of such election by publication in a newspaper published within the city or town whose limits are proposed to be extended if a newspaper is published therein, and if no newspaper is published in such municipality, then by posting notices at three public places in such municipality, which notice shall state the day on which such election is to be held, the voting place or places, the boundaries within which voters must reside to vote at the respective voting places, which must be within the territory proposed to be brought into the city or town, and such notice must give a des-

cription of the territory proposed to be annexed, and must state that a map of such territory is on file in the office of the judge of probate of said county, open to the inspection of the public.

"(3) The judge of probate may designate as many places **within the territory proposed to be annexed** as he may deem necessary for the convenience of the voters and must designate the boundaries within which the voters must reside to vote at the respective voting places and shall appoint three inspectors of election, two clerks and one returning officer for each voting place, which inspectors shall manage the election at the respective voting places at which they are appointed as inspectors.

"(4) **Each qualified elector who has resided within the boundaries of the territory proposed to be brought into the city or town for three months next preceding the election, may vote at such election, but must vote at the voting place designated by the judge of probate for voters in the territory in which he resides.**"

(Emphasis supplied)

From a careful reading of the above, with particular reference to the emphasized portions thereof, it is my opinion that only those qualified electors, who have resided within the boundaries of the territory sought to be annexed for three months next preceding the election, are entitled to vote in said election. There is no requirement that such electors own property in said territory.

I wish to call your attention to the following portion of Subsection (9) of Section 135, supra, which gives to those property owners within the territory sought to be annexed, but who do not reside, a voice in the matter of such annexation:

"* * * No platted or unplatted territory shall be included within such boundary unless there are at least four qualified electors residing on each quarter of each quarter section, according to government survey, or part thereof, of such platted or unplatted land, who assent thereto in writing by signing said petition, together with the consent of the persons, firms or corporations owning at least sixty per cent of the acreage of such platted or unplatted land, such consent to be signified by their signing said petition. Proof of residence and qualification as electors of petitioners and of persons affected shall be made to the judge of probate, by affidavit or otherwise, as he may direct. When determining the ownership of the land within such boundary, the persons, firms or corporations assessing the same for taxation shall be accepted by the probate judge as prima facie the owners thereof. * * *"

See Quarterly Report of Attorney General, Vol. VI, page 172.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 9, 1941.

Hon. Thomas A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Counties—Courts of County Commissioners—

Courts of County Commissioners held without authority to appropriate funds to improve a public park owned by a city.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter of July 18, 1941, in which you request an official opinion, is as follows:

"Enclosed is a certified copy of an order of the Court of County Commissioners of Escambia County, Alabama, authorizing the appropriation of Three Hundred—(\$300.00)—Dollars to be used for the improvement of an athletic park. I am also enclosing a certified copy of a claim filed against the County for actual labor and materials used in such improvement and paid for by the County under said order.

"This is a public park owned by the City of Brewton and used exclusively for the public as mentioned in paragraph 2 of the enclosed copy of Order No. 10.

"This amount has been charged back to me as Chairman and Disbursing Officer of said Court of County Commissioners by the State Examiners who claim there is no authority of law for the payment of such appropriation.

"Your official opinion is requested as to whether or not this is a legal claim against the County."

I am of the opinion that your inquiry should be answered in the negative. The statement of facts sets out that the property in question "is a public park owned by the City of Brewton." No question of joint ownership with the county is presented, nor does the county claim any right, title or interest in the said park, as I understand your facts.

Courts of County Commissioners are bodies confined to the exercise of powers expressly granted to them by law, and I find no provision of law under which such an appropriation may be made by the county to a city.

It is a well settled rule of law that a county cannot be charged with an expense not specifically authorized or necessarily implied by law, and unless there is a statute authorizing the expense it cannot be recovered out

of the county. **Van Eppes, v. Commissioners' Court**, 25 Ala. 460; **Naftle v. County of Montgomery**, 127 Ala. 563, 29; **Walker v. Bridgeforth, Treasurer**, 9 Ala. App. 257, 62 So. 323; **Weakley v. Henry**, 224 Ala. 463, 86 So. 46.

No officer of the county can charge it with the payment of other claims, however meritorious the consideration, or whatever may be the benefit the county may derive and enjoy from them. **Jack v. Moore**, 66 Ala. 184; **Naftel v. City of Montgomery**, *supra*; **Weakley v. Henry**, *supra*. Cf. Quarterly Report of Attorney General, Volume XVII, page 393, and authorities cited therein. See also Quarterly Report of Attorney General, Volume XIX, page 319.

I note that the resolution attached to your request and entitled "Order No. 10 (Athletic Park)" contains the following provisions:

"2nd.—That the City of Brewton, that both public and private corporations, persons and firms, have petitioned this Court to aid in this matter and make this appropriation, after having first made large and liberal appropriations from their own finances to aid the matter, project and purposes herein supported; that there is an Athletic Park. Baseball Park, Football Park, and recreational park which either belongs to, or is under the direction and control of the City of Brewton, Alabama, and which park is used for public purposes, civic purposes, recreational purposes, athletic purposes, assembly purposes, including the meeting of farmers and the 4-H Clubs of the County, etc., which the general public desires to improve and put into good condition and make it better serve said purposes above referred to and especially for the development of the labor resources of the County.

"3rd.—That under and by virtue of the law and Sub-(18) and Sub-(23) of Section 6755 of the Code of 1923, this Court and said County does hereby appropriate the sum of \$300.00 which will be expended for the improvement of said park and for the purpose of developing and promoting the labor resources and other resources of every kind of said County, and also advancing the interest of agriculture within the county."

In my judgment, the resolution shows on its face that the promotion of either labor or agricultural interests of the county are of secondary consideration and only incidental to the main purpose, to wit, the improvement of a recreational park in the City of Brewton. I am, therefore, of the opinion that there is no authority under the statutory provisions cited in the resolution, (now contained in Code, 1940, Title 12, §12) for the appropriation in question.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 12, 1941.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Counties—Sheriffs—Jails—

Court of County Commissioners or other like governing body may employ the sheriff's son as Janitor for the County Jail.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion bearing date of September 9, 1941 follows:

"Please advise me whether the Sheriff's Son can be legally employed by the Commissioners' Court as janitor for County Jail."

I find no law prohibiting the Court of County Commissioners or other like governing body from employing the sheriff's son as Janitor for the County Jail. Code 1904, Title 12, Section 29, is not applicable to the instant inquiry as that section makes it unlawful for a member of a Commissioners' Court or other like governing body to take part in the employment of a person related to him. Cf. **Garrison v. Summers**, 223, Ala. 17, 134 So. 675.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 13, 1941.

Hon. C. H. Keller, Register,
Circuit Court, Cullman County,
Cullman, Alabama.

Register—Commissions—Fees—

Where high bidder at judicial sale fails to pay money into court and it is necessary for the register to resell the property, register is entitled to only one commission on the sale.

Judicial Sale—

Not completed until confirmed by the court, and no title, legal or equitable, passes until confirmation.

Opinion by Assistant Attorney General Vardaman:

Dear Sir:

Your request for official opinion bearing date of August 27, 1941 is as follows:

"Re: Commission on sales.

"Under the schedule of fees allowed Registers under the Code of Alabama, 1940, Title 11, Section 27, page 273, the Registers of the several courts are allowed commission on sales on a graduated scale. I have had several instances where I have sold property under a decree of the court upon which I was due a commission on the sale and due to the fact that the purchaser failed or refused to pay the purchase money into court, it was necessary that the property be resold. I will thank you to advise me that, if in a case of this kind, where the same property has been sold twice if I am entitled to claim my commission on each sale or if I am only entitled to commission on the last sale. In other words, do I get commission on only one sale or am I entitled to commission for each sale made."

The law of costs and fees is penal in nature and must be strictly construed. Code of Alabama, 1940, Title 11, §1; **Troup v. Morgan County**, 109 Ala. 162, 19 So. 503.

The fee to which your inquiry refers is provided by Code 1940, Title 11, §27, for "commissions on sales." In view of the strict construction that must be placed on cost and fee statutes, it is apparent that this section contemplates the payment of the commission only in the case of a completed sale.

It is well settled that a judicial sale is not completed until the purchase price has been paid, or secured in some way, and the sale has been confirmed by the court. In the case of **Woodall v. Orr**, 219 Ala. 681, 123 So. 220, the court said:

"This was a strictly judicial sale wherein the court was, in legal effect, the seller, and until confirmation, is incomplete, and confers no title either legal or equitable. **McEachin v. Warren**, 92 Ala. 554, 9 So. 197; **Aderholt v. Henry**, 82 Ala. 541, 30 So. 114; **Witter v. Dudley**, 41 Ala. 616; **Mobile Branch Bank v. Hunt**, 8 Ala. 876; **Cruikshank v. Luttrell**, 67 Ala. 318; **Patten v. Swope**, 204 Ala. 169, 85 So. 513; 16 R. C. L. p. 114 et seq."

Therefore, the premise considered, it is my opinion that in the situation presented by your inquiry you would be entitled to only one commission on the sale.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 13, 1941.

Hon. W. P. Tarrt,
Register, Circuit Court,
Sumter County,
Livingston, Alabama.

Registers—Costs and Fees—

Registers held entitled to only one fee of 50c for publication of notice of settlement of an estate, even though said publication runs for four consecutive weeks.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter of August 8, 1941, in which you request an official opinion, is as follows:

"May I ask that you get me correct on the below statement.

"Our fees of order of publication are state as \$1.00 each, now in the yearly settlement of the estate by the administrator, this order of publication runs for 4 consecutive weeks and the copies of this are mailed to the heirs each week. What I desire to know is if the charge is merely for the \$1.00 regardless of how many weeks it runs or is the charge for each week I mail the heirs their copies or is the charge to be made of \$1.00 to each heir I mail same to?"

In reply I wish to advise that in my opinion the fee of \$1.00 referred to by you is not collectible for the notice of publication considered in your request. The provisions of law authorizing the fee of \$1.00 for notice of publication are found in Section 27 of Title 11 of the Code of 1940 as follows:

"§27. **Fees allowed to registers.**—Registers are entitled to the following fees for the following services:

"For each order of publication, to include all nonresident defendants against whom publication is had at the same time\$1.00"

You will notice that this fee is for service upon defendants, which must necessarily contemplate the notice to defendants of a pending cause of action against them, filed in court. It is my opinion that this particular fee is not collectible for publication of notice of final settlement of estates.

I refer you to a further provision of law found in the above cited Title and Section of the Code of 1940, which provides as follows:

"Each notice not otherwise provided for\$.50."

In my opinion, this is the provision of law authorizing the fee for notice of final settlement to be published in a newspaper as named by you. It is my opinion, however, that only one fee may be collected for giving this notice of final settlement to the newspaper, as it is only necessary to give one notice to the paper with instructions to publish the same in accordance with the terms of the order of the Court directing the same to be published.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 15, 1941.

Hon. J. F. Brawner, Director,
Department of Public Safety,
Capitol.

**Motor Vehicles—Driving While Intoxicated—Drivers' Licenses—
Revocation—**

It is mandatory on the Director of Public Safety, upon receiving a record of the conviction of a person of the offense of driving a motor vehicle while intoxicated, when such conviction has become final, to revoke the driver's license of such person, notwithstanding the fact that the offense, has prohibited the person so convicted from driving a motor vehicle upon the highways of this state for a certain period of time, within the limits prescribed by statute.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of July 17, 1941, is as follows:

"Title 36, Section 2, 1940 Code of Alabama, provides that where the court convicts a person for driving a motor vehicle upon the highways of this State while under the influence of intoxicating liquors that as an additional punishment the court trying the cause shall have authority to prohibit and must prohibit the person so convicted from driving any motor vehicle upon the highways of this State for a period not to exceed one year.

"Title 36, Section 68, 1940 Code of Alabama, provides among other things that the Director of Public Safety shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction of driving a motor vehicle while intoxicated.

"I wish to thank you to advise me whether it is mandatory upon the Director of Public Safety to revoke the driver's license of a person con-

victed of driving a motor vehicle while under the influence of intoxicating liquors upon receiving a court report showing that his conviction has become final and that the court trying the case imposed additional punishment prohibiting the use of their driver's license for a short period of time. There seems to be some conflict in these two sections of law and we are confronted with this situation quite frequently."

Code, 1940, Title 36, Section 2, defines the offense of driving while intoxicated, and prescribes the punishment therefor. It reads as follows:

"§2. Persons under the influence of intoxicating liquor or narcotic drugs.—It shall be unlawful for any person, whether licensed or not, who is an habitual user of narcotic drugs, or any person who is intoxicated, to drive any motor vehicle upon any highway of this state, and upon conviction shall be punished by imprisonment in the county or municipal jail for not more than one year or by fine of not less than one hundred dollars nor more than one thousand dollars or by both such fine and imprisonment in the discretion of the court trying the cause. **As additional punishment the court trying the cause shall have authority to prohibit and must prohibit the person so convicted from driving any motor vehicle upon the public highways of this state for a period not to exceed one year.** On a second or subsequent conviction he shall be punished by imprisonment at hard labor for not more than one year or in the discretion of the court a fine of not less than one hundred dollars nor more than one thousand dollars, or both, **and in addition thereto the court trying said cause shall, as additional punishment, have authority to prohibit the person convicted from driving a motor vehicle upon the highways of this state for a period of not less than thirty days nor more than one year.** All fines collected for the violation of this section shall be paid into the highway patrol fund, as now provided by law. (Emphasis supplied)

Code 1940, Title 36, Chapter 2, Article 1, Sections 59-74, provides for the registration and licensing of drivers, and the organization and functioning of the Alabama State Highway Patrol. Section 59 thereof contains a requirement that every person, except those exempted, before driving any motor vehicle upon a public highway in this state shall procure a driver's license. Section 68 thereof is the section dealing with the cancellation, suspension or revocation of drivers' licenses or permits. Said section provides in pertinent part:

"* * * Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the driver's license of such person by the director of public safety, the court in which such conviction is had shall require the surrender to it of the driver's license then held by the person so convicted and the court shall thereupon cause the same to be forwarded together with a record of such conviction to the director of public safety. *** * *** For the purposes of this article the term 'conviction'

shall mean a final conviction. Also, for the purposes of this article a forfeiture of bail to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction. **The director of public safety shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction of any of the following offenses, when such conviction has become final; * * * driving a motor vehicle by a person who is an habitual user of narcotic drugs or while intoxicated; * * *.**" (Emphasis supplied)

As indicated in your letter of inquiry, the emphasized portions of Section 2, supra, apparently conflict with the emphasized portions of the above-quoted excerpts from Section 68, supra. In this situation (where there are existing statutory provisions which apparently conflict) it is necessary to ascertain the legislative intent, and to give a field of operation to both statutory provisions, if possible.

Section 2, supra, derives from Act No. 198, S. 22, approved March 4, 1937 (General Acts, 1936-37, page 229). The emphasized portions of said section are in exactly the same language as they appeared in Act No. 198, supra, except that in that act the word "authority," at both places where it appears, was immediately preceded by the word "exclusive." The word "exclusive" was omitted in the codification. Prior to the enactment of Act No. 198, supra, the offense of driving while intoxicated was defined, and the punishment therefor prescribed, by Section 48 of Act No. 347, H. 391, approved August 23, 1927 (General Acts, 1927, page 348), known as the Alabama Highway Code. That section gave the court the authority, as a part of the punishment for a second or subsequent conviction thereunder, to "prohibit the person so convicted from driving a motor vehicle upon the public highways of this state for a period of not exceeding one year." This is the first time such authority was given to the court. No such authority was contained therein as to a first conviction. It is also to be noted, as will hereinafter appear, that this proviso first appeared in the statutory law of this state prior to the time that a person, not exempted, was required to procure a driver's license before driving a motor vehicle upon the public highways of this state.

Chapter 2, Article 1, Sections 59-74, supra, derives from Act No. 181, H. 245, approved March 18, 1939 (General Acts, 1939, page 300), and the above-quoted excerpts from Section 68, supra, appear in identical language, so far as the legal effect is concerned, in Section 10 of said act. The forerunner of Act No. 181, supra, and the act which originally required every person, except those exempted, to procure a driver's license before operating or driving any motor vehicle upon the public highways of this state was Act No. 331, H. 545, approved September 2, 1935 (General Acts, 1935, page 756). Section 6 of said act is comparable to Section 10 of Act No. 181, supra, and Section 68, supra, and provides as pertinent:

"Section 6. The Chief of the State Highway Patrol shall forthwith revoke, for a period of ninety days from date of revocation, the operating privilege of any person, upon receiving a certified record from the clerk of the court of proceedings in which such person pleaded guilty, entered a plea of nolo contendere, or was found guilty by a court or jury, of any of the following crimes: 1. Operating a motor vehicle while under the influence of intoxicating liquor, or any narcotic or habit producing drug,

or permitting any person who may be under the influence of intoxicating liquor or narcotic or habit producing drug to operate any motor vehicle owned by him or in his custody or control. * * *

It can be seen from a reading of Section 2, *supra*, that an order prohibiting a person, convicted of the offense of driving while intoxicated from driving any motor vehicle upon the public highways of this state for a period of time within the limits therein prescribed, made by the court under the authority of said section, is additional punishment for the offense; and that the court has the authority to make this order, or impose this additional punishment, without regard to the question of whether or not the person so convicted has a driver's license, or is required to have a driver's license. Indeed, as pointed out hereinabove, when this authority first appeared in the statutory law of this state (Section 48, *supra*), there was no statutory requirement that a person procure a driver's license before driving any motor vehicle upon the public highways of this state. It should be noted that it is not a criminal offense for a person to violate such an order, and presumably, the only way by which a person could be punished for violating such an order would be by a proceeding against him for contempt of court for a violation of a judgment or order of the court, validly made.

On the other hand, a reading of the quoted excerpts from Section 68, *supra*, shows that it is mandatory on the Director of Public Safety to revoke the driver's license of any person convicted of the offense of driving while intoxicated, upon receiving a record of such person's conviction, when the same has become final. The license thus revoked is the license which a person, not exempted, is required to procure before driving any motor vehicle upon the public highways of this state by Section 59, *supra*; and the revocation of the same by the Director of Public Safety is no part of the punishment for the offense of driving while intoxicated. I have previously advised you in an opinion under date of October 28, 1940 (Quarterly Report of Attorney General, Vol. XXI, page 106), that the revocation by the Director of Public Safety of the driver's license of a person convicted of the offense of driving while intoxicated is not a part of the sentence imposed for the offense. Section 70, *supra*, makes it a criminal offense, punishable as therein provided, for a person whose driver's license has been revoked, to drive any motor vehicle upon the public highways of this state.

The premises considered, it is my opinion that the emphasized portions of Section 2, *supra*, and the emphasized portions of the above-quoted excerpts from Section 68, *supra*, are not in conflict, and that both have a field of operation. That this is in accord with the legislative intent is indicated by the fact that Section 68, *supra*, makes it the duty of the court in which a person is convicted of the offense of driving while intoxicated to require the person so convicted to surrender to it his driver's license, which the court must thereupon cause to be forwarded, together with a record of the conviction, to the Director of Public Safety.

The legislative history of these two sections also shows that it was the legislative intent that each of these sections have a field of operation. As pointed out above, the statute originally giving the court authority to prohibit a person convicted of the offense of driving while intoxicated from driving a motor vehicle upon the public highways of this state for a certain period of time, as additional punishment for the offense, was enacted prior to the

enactment of the statute originally requiring a person to procure a driver's license before driving any motor vehicle upon the public highways of this state, which statute also contained a requirement that the Chief of the State Highway Patrol (now Director of Public Safety) revoke the driver's license or operating privilege of any person convicted of the offense of driving while intoxicated. Then the statute originally requiring a driver's license, and placing the requirement as to revocation on the Chief of the State Highway Patrol, was enacted. Later, the statute vesting this authority in the court was reenacted; and still later, the statute requiring a driver's license and requiring revocation by the Director of Public Safety was reenacted. None of these enactments contains any indication that the legislature considered this authority vested in the court to be in conflict with the requirement as to revocation placed on the Chief of the State Highway Patrol (Director of Public Safety), unless it be said that the use of the word "exclusive" before the word "authority" each time the same appeared in Act No. 198, supra, was indicative of the fact that the legislature considered this authority vested in the court to be in conflict with the requirement as to revocation placed on the Chief of the State Highway Patrol. However, the inclusion of both of these provisions in the Code of 1940, with the deletion, in the codification, of the word "exclusive" where the same appeared before the word "authority" in the statute from which Section 2, supra, derives, serves, in my opinion, to remove any doubt as to the intention of the legislature.

Consequently, it is my opinion that it is mandatory on the Director of Public Safety, upon receiving a record of the conviction of a person of the offense of driving while intoxicated, when such conviction has become final, to revoke the driver's license of such person, notwithstanding the fact that the court, as part of the punishment for the offense, has prohibited the person so convicted from driving a motor vehicle upon the highways of this state for a certain period of time, within the limits prescribed by statute.

This conclusion is in accord with the well known rules of statutory construction stated in an opinion of this office rendered to Hon. A. R. Forsyth, Director of Finance, Capitol, under date of August 12, 1941, a copy of which is enclosed for your information.

Even if it be considered that the emphasized portions of Section 2, supra, conflict with the emphasized portions of the above-quoted excerpts from Section 68, supra, then, under the applicable rules of statutory construction, it would still be mandatory upon the Director of Public Safety to revoke the driver's license of a person convicted of the offense of driving while intoxicated, when he receives a record of such person's conviction, and the same has become final. See *Steele v. State*, 61 Ala. 213.

Chapter 2, Article 1, supra, contains no provisions as to the time when a person whose driver's license is revoked by the Director of Public Safety may apply for a new driver's license. I am informed that this is governed by a rule of regulation promulgated by the Director of Public Safety, with the approval of the Governor, under the provisions of Section 72, supra. Should a person who has had his driver's license revoked by the Director of Public Safety, as a result of his conviction for the offense of driving while intoxicated, have a new driver's license issued to him before the expiration of the period of time, within the limits prescribed by statute, he had been prohibited

by the court in which he was convicted from driving a motor vehicle upon the public highways of this state, as part of the punishment for the offense, such new driver's license would not give him the right to drive a motor vehicle upon the public highways of this state until the expiration of the period of time that he had been prohibited from driving a motor vehicle upon the public highways of this state by such order of the court.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 16, 1941.

Hon. John D. Petree,
Director of Industrial Relations,
Capitol.

Notices—Service by Registered Mail—Director of Industrial Relations—

When the Director of Industrial Relations gives written notice to a defaulting employer by registered mail, addressed to his last known place of business or address, under the provisions of Code of 1940, Title 26, Chapter 4, Article 7, Section 240, service of the same is affected, whether the employer actually receives the notice or not.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 24, 1941, in which you request my opinion as follows:

“We will appreciate your giving this Department your opinion with respect to the following:

“Title 26, Chapter 4, Article 7, Section 240 of the 1940 Code of Alabama, provides for the enforcement of delinquent Unemployment Compensation contribution or taxes. In part, said Section provides as follows:

“In addition to or independent of the above remedy by civil action, the Director after giving an employer who defaults in any payment of contributions, interest or penalties provided by this Chapter, fifteen days written notice by registered mail, addressed to his last known place of business or address, may file in the office of the Clerk of the Circuit Court in the Circuit in which the employer has his principal place of business, a statement, specifying the amount of the contributions, interest and penalties due, the name and last

known address of the employer liable for the same, that the Director has complied with all the provisions of this Chapter in relation to the computation and levy of contributions, interest and penalty, and a request that judgment be entered against the employer in the amount of the contributions, interest and penalties set forth in the statement; * * *'

" Is it your opinion that the notice by registered mail provided for in the above quoted portion of the Section actually requires that the registered letter be received by the employer, or is it your opinion that, under the law, it is sufficient notice, if the statement provided for in the above mentioned Section is sent by registered mail, addressed to the employer's last known place of business or address without regard to whether the employer actually receives the letter?

"In considering this matter we would like to call your attention to the following citations; 46 Corpus Juris page 559, Section 69, and the cases cited in notes 34-36 thereunder, and especially the case of Hurley vs. Olcott et al (New York) 91 Southeastern 270."

Code 1940, Title 26, Chapter 4, Article 7, Section 240, provides in pertinent part:

"* * * In addition to or independently of the above remedy by civil action, **the director after giving an employer who defaults in any payment of contributions, interest or penalties provided by this chapter, fifteen days written notice by registered mail, addressed to his last known place of business or address,** may file in the office of the clerk of the circuit court of the circuit in which the employer has his principal place of business, a statement, specifying the amount of the contributions, interest and penalties due, the name and last known address of the employer liable for the same, that the director has complied with all the provisions of this chapter in relation to the computation and levy of contributions, interest and penalty, and a request that judgment be entered against the employer in the amount of the contributions, interest and penalty set forth in the statement; provided, however, that the employer may, within said fifteen day period, pay the amount specified in such notice, under protest, and shall thereupon have the right to initiate, within sixty days following such payment, and to maintain, his action against the director for a refund of all or part of any such amount and to recover so much thereof as may have been erroneously assessed or paid, such action to be brought and prosecuted in the county wherein is located the principal place of business of the employer, and if the employer is successful in such action, refund shall be made accordingly by the director. If no such payment is made, the clerk of the circuit court immediately upon the filing of such statement shall enter a judgment for the director of industrial relations against the employer in the amount of the contributions, interest and penalty set forth in the statement. A certificate of such judgment or a copy thereof may be filed in the probate court of any county in the state and from the time of such recording the amount of the contributions, interest and penalty therein set forth shall constitute a prior lien upon all the real and personal property of the employer in such county, except as to the lien of general property taxes and except as to valid liens existing at the time of the filing of the state-

ment herein provided for. Execution shall issue upon such judgment upon request of the director in the same manner as execution may issue upon other judgments and sales shall be held under such execution as provided by the laws of Alabama. In all proceedings under this section the director, or his authorized agents shall be empowered to act on behalf of the State of Alabama in bidding at any such sale and otherwise. * * * (Emphasis supplied)

It is a general rule, which seems to be universally followed, that when notice is required by law to be given, unless otherwise provided by law, the service of the notice must be personal. See 46 C. J. 557, Section 65. This rule obtains in Alabama. See *Naro v. State*, 212 Ala. 5, 101 So. 666.

However, when expressly authorized by statute, such notice may be given by mail, registered or otherwise; but there is a division of authority as to when service is deemed to have been effected where the notice is given by mail. This is indicated by the following quotation from 46 C. J. 559, Section 69:

“§69. **By Mail—**a. **In General.** While statutory provisions or the circumstances and the conduct of the parties may be such as to indicate that notice by mail is contemplated, personal service cannot be made by mail, unless expressly authorized by statute. A party relying upon the service of a notice by mail must show a strict compliance with the requirements of the statute.

“When effective. In the absence of custom, statute, estoppel, or express contract stipulation, when a notice, affecting a right, is sought to be served by mail, the service is not effected until the notice comes into the hands of the one to be served, and he acquires knowledge of its contents, except perhaps in those cases where the party to be notified resorts to some trick or artifice to avoid knowledge of its contents. However, by force of statute or by provision of contract, service may be effective when the notice is properly mailed, regardless of its receipt by the addressee. * * * ” (Emphasis supplied)

One of the cases cited in the annotation in support of the above quoted excerpt is the case of *Hurley v. Olcott*, 198 N. Y. 132, 91 N. E. 270 (1910). The statutory provision there under consideration provided:

“The notice may be served by post by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary court of the post.”

In speaking of this provision, the court said:

“This provision is not anomalous. In many cases the statute provides that notice may be served by mail. Such is the provision as to service of papers on the attorneys in an action, and it has been uniformly held that the service was effective when the papers were properly mailed regardless of their receipt by the adverse party. The risk of miscarriage is

with the party to whom they are directed. *Jacobs v. Hooker*, 1 Barb. 71; *Brown v. Briggs*, 1 How. Prac. 152; *Radcliff v. Van Benthuyssen*, 3 How. Prac. 67. The law may prescribe other than personal service even of original process by which it is sought to bring a party into court and bind him by its judgment. In *Matter of Empire City Bank (U. S. Trust Co. v. U. S. F. Ins. Co.)* 18 N. Y. 199, 215, it was held that personal service is not required to constitute due process of law, and that the Legislature may prescribe 'a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him.' In that case the notice was by advertisement in a newspaper. To the same effect is *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129, citing *Cooley on Constitutional Limitations*, p. 404."

In the case of *Ford v. Genereux*, 104 Colo. 17, 87 P. (2d) 749 (1939), the statute under consideration provided:

"The county treasurer shall serve or cause to be served, by personal service or by registered mail, a * * * notice (upon designated persons) * * * nor more than five months, and at least three months before the time of issuance of such deed."

The observation of the court was as follows:

"Where service of notice by registered mail is expressly authorized by statute, as is the situation here, it has generally been held that service is effected when the notice is properly addressed, registered and mailed. *Hurley v. Olcott*, 198 N. Y. 132, 91 N. E. 270, 28 L. R. A., N. S., 238 (under Employers' Liability Act), and *Ross v. Hawkeye Ins. Co.*, 83 Iowa 586, 50 N. W. 47; *Ross v. Hawkeye Ins. Co.*, 93 Iowa 222, 61 N. W. 852, 34 L. R. A. 466 (statutory notice of cancellation of insurance policy)."

To like effect are the following cases: *Griffin v. Board of Commissioners of Walworth County*, 20 S. D. 142, 104, N. W. 1117 (1905); *Hartford Trust Co. v. Town of West Hartford*, 84 Conn. 646, 81 Atl. 244 (1911); *Wolontier v. United States Casualty Co.*, 126 Va. 156, 101 S. E. 58 (1919); *Leininger v. North American National Life Ins. Co.*, (Neb.) 215 N. W. 167 (1927); *MacLean v. Reynolds*, 175 Minn. 112, 220 N. W. 435, (1928); *Buffalo Cadillac Corp. v. Eisele*, 266 N. Y. S. 165, 148 Misc. 592 (1933); *Commonwealth v. Miele* (Pa.), 14 Atl. (2d) 337 (1940); *Commonwealth v. Coldren*, (Pa.), 14 Atl. (2d) 340 (1940).

A contrary conclusion was reached in the following cases: *Martin v. Hutto*, 82 S. C. 432, 64 S. E. 421 (1909); *Regan v. Atlantic Refining Co.*, (Mass.) 23 N. E. (2d.) 869 (1939).

The prevailing view seems to be in accord with that expressed in *Hurley v. Alcott*, *supra* and *Ford v. Genereux*, *supra*. For that reason, and on the basis of those cases and the other cases to like effect, cited *supra*, I am of the opinion that when the Director of Industrial Relations gives written notice to

a defaulting employer by registered mail, addressed to his last known place of business, under the provisions of Section 240, supra, service of the same is effected, whether the employer actually receives the notice or not.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 16, 1941.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Taxation—Insurance—Corporations — Exemptions — Agency —
Brokers—Title 51, Section 495, Code of 1940 construed.

1. A corporation engaged in the general insurance and real estate business, which acts as agent for nonresident life insurance company for the purpose of making loans in the name of said life insurance company and for which service it receives a commission, not liable for the license prescribed by Title 51, Section 495.

2. A corporation which is engaged in the general insurance and real estate business, which makes loans for individual clients in the name of the client and for which service it receives compensation, held liable for the license prescribed by Title 51, Section 495, on that part of its business which is not exempted by reason of its acting as agent for some person, etc. specifically exempted by the provisions of said section.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of August 26, 1941, in which you request my official opinion as follows:

"Please give me an opinion on the following questions:

"1. Is a corporation engaged in the general insurance and real estate business which acts as Agent for a nonresident Life Insurance Company for the purpose of making loans in the name of said Life Insurance Company, for which service it receives a commission, liable for the license prescribed in Section 495, Title 51 of the Code of Alabama 1940?

"2. Is a corporation which is engaged in the general insurance and real estate business which makes loans for individual clients, both resi-

dent and non-resident, in the name of the client, for which service it receives a brokerage fee, liable for the license prescribed by Section 495, Title 51, of the Code of Alabama 1940?"

Title 51, Section 495, Code of Alabama, 1940 derives from the General Revenue Act of 1935, Schedule 93½ (General Acts, 1935, p. 476).

This schedule was construed in the case of **Leath vs. Wilson**, 238 Ala 577, 192 So. 417. In part material to this inquiry the court held:

"So we think the meaning is clear that 93½(1) and 93½(2) are both complete with the one sentence in which is respectively expressed and that 93½(3) is affected by all the balance of the paragraph it follows."

I assume that your inquiry is addressed to Subsection 3 of Section 495 of Title 51, Code of 1940, (Schedule 93½(3) of the Revenue Act of 1935). As noted above, this subsection must be considered apart from (1) and (2) of said Section.

Your inquiry No. 1 is specifically answered by that provision of said Section which pertinent part is as follows:

"Provided that * * * insurance companies and their agencies which are otherwise taxed under the laws of this state shall not be required to pay a license under this section."

Article 12 of Chapter 20, Title 51, Code of 1940, Sections 812-829 deals particularly with the levy on foreign and domestic insurance companies as a condition precedent to doing business in the State of Alabama. It is, therefore, my opinion that an insurance company lending money on mortgages secured by real estate in this State is not liable for the payment of an annual license based on the amount of such loans made during any taxable year, and that a corporation engaged in the general insurance and real estate business, which acts as an agent for an insurance company for the purpose of making loans in the name of the insurance company, though receiving a commission for its services, is likewise not liable.

The existence of an agency is not a matter of easy determination. The general rule of agency with respect to the negotiation of loans is expressed in 2 C. J. S. 1052, as follows:

"In cases of agency to negotiate loans the question whether the intermediary is the agent of the borrower or the lender must be answered by the particular facts and circumstances of each case, such as the source of his compensation, the preparation of the necessary instruments, and the course of prior dealings, but while these may be regarded as constituting the intermediary and agent of the borrower or the lender, as the case may be, they are not necessarily conclusive so as to preclude a showing that the intermediary was in fact the agent of the other party, or was actually acting as the agent for each, but for different purposes."

Your second inquiry is answered in the affirmative. The Supreme Court of Alabama, in the case of **Tucker v. State**, 213 Ala. 421, 105 So. 190, in construing Schedule 101 of the revenue laws of 1919, which imposed a license on real estate agents also engaging "in the business of loaning money," held:

"The court is of the opinion that said subdivision applies to all who engage in the business of lending money as an incident to the real estate business, whether as broker, agent, or for themselves, and therefore includes this appellant, who was engaged in the real estate business on commission, and who admitted that he accepted application for and negotiated loans for others and received compensation therefor."

In an opinion rendered to Mr. J. R. Gamble, Tax Commission, under date of July 13, 1933 (Biennial Report of Attorney General, 1932-34, page 290), the Tucker case was cited and held applicable to the money lenders license then applicable.

I do not find that Code 1940, Title 51, Section 495, is so materially different in legal effort from its predecessors as to permit a different conclusion. You are therefore advised that a corporation engaged in the general insurance and real estate business which makes loans for individual clients, both resident and nonresident, in the name of the client, and for which service it receives a brokerage fee, is liable for the license prescribed by Section 495, *supra*, on that part of its business which is not exempted by reason of it acting as agent for some person, firm, association, or corporation specifically exempted by the provisions of said Section 495.

Under the facts stated, there is no question of exclusiveness of agency or representation of nonresident principals exclusively to make the license when so applied an invasion of the Commerce Clause of the Constitution of the United States. **Stratford v. Montgomery**, 110 Ala. 619, 20 So. 127. Cf. Biennial Report of Attorney General, 1920-22, page 104.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 16, 1941.

Hon. J. S. Wittmeier,
Judge of Probate,
Blount County,
Oneonta, Alabama.

Counties—Temporary loans—

Temporary loans made by counties in anticipation of collection of taxes, under Code 1940, Title 12, Chapter 9, Sections 124-128, discussed generally.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of August 12, 1941, is as follows:

"Blount County does not have any temporary loans, unless approved claims for monthly payments on road machinery are such.

"Can this county borrow between now and September 30, 1941, fifty per cent of revenue collected last year for a period of one day in order to be in position to borrow in case it may become necessary to borrow in the future?

"If so, does this apply only to the revenue going into the General Fund of the County?"

You have informed me that what you really desire to know is whether or not, under the existing law, the right of a county to make a temporary loan in the anticipation of the collection of taxes for any particular year, is affected by the question of whether or not such county made such a temporary loan during the preceding year. Or, stated differently, whether or not a county must make such a temporary loan in one particular year in order to have the right to make such a temporary loan during the succeeding year?

Prior to 1935, the right of a county to make a temporary loan in anticipation of the collection of taxes for the year in which such loan was made, was governed by Sections 239, 240, as amended by Act No. 168, S. 191, approved November 2, 1932, (General Acts, 1932, page 196), 241, 242 and 243 of the Code of Alabama, 1923, or Sections 6776, 6777, as amended by Act No. 536, H. 1104, approved July 22, 1931, (General Acts, 1931, page 639), 6778, 6779, as amended by Act No. 638, S. 357, approved September 6, 1927, (General Acts, 1927, page 753), 6780 and 6781 of the Code of Alabama, 1923. Cf. **Ramage, Parks & Co. v. Folmar**, 219 Ala. 142, 121 So. 504. At that time the amount of each temporary loans could not exceed one-half the income of said county for the preceding year. See Section 240, supra, and Section 6777, as amended, supra. Beginning with the first day of October, 1935, the right of a county to make such a temporary loan was governed by the above-cited statutory provisions, as the same were affected by Section 11 of Act No. 379, H. 191, approved September 9, 1935, and effective on October 1, 1935. (General Acts, 1935, page 803), known as the County Financial Control Act. Cf. Opinion to Hon. E. A. Hammett, Judge of Probate, Talladega County, Talladega, Alabama, under date of December 6, 1935, Quarterly Report of Attorney General, Vol. I, page 317. Said Section 11 provides in pertinent part:

"Section 11. TEMPORARY LOANS. Nothing in this Act shall be construed to repeal the general laws of the State of Alabama authorizing counties to make temporary loans in anticipation of collection of taxes; provided, however, that hereafter no temporary loan or loans in anticipation of the collection of taxes made for the purpose of enabling counties to meet their current obligations shall exceed 95% of the amount of such temporary loans made during the preceding fiscal year, except that

to meet emergencies provided for in Section 17 hereof, temporary loans in anticipation of collection of taxes may be made up to the full amount provided for under the general laws of the State of Alabama; * * *."

The effect of the above-quoted provisions of Section 11, *supra*, was to give a county, during the first fiscal year after its effective date, i.e., the fiscal year 1935-36, the right to make a temporary loan in an amount not exceeding one-half of the income of said county for the preceding year, as it had had under previously existing laws; and, thereafter, the right to make such a temporary loan in an amount not exceeding 95% of the amount of such temporary loan made during the preceding year, except that to meet emergencies provided for in Section 17 of Act No. 379, *supra*, such temporary loan might be made up to the full amount (one-half of the income of said county for the preceding year) provided for under the general laws of the State of Alabama. Consequently, under the statutory law then existing, a county could only make a temporary loan for the then current fiscal year (other than to meet emergencies) provided it had made such a temporary loan during the preceding fiscal year, and even then, the amount of such temporary loan for the then current fiscal year could not exceed 95% of the amount of the temporary loan made during the preceding fiscal year. See opinion to Hon. S. P. Poyner, Judge of Probate, Houston County, Dothan, Alabama, under date of April 11, 1936, Quarterly Report of Attorney General, Vol. III, page 42, Cf. Opinion to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of August 7, 1936, Quarterly Report of Attorney General, Vol. IV, page 117.

The right of a county to make such a temporary loan is treated in Code 1940, Title 12, Chapter 9, Section 124-128. Section 125 deals with the amount of such loans and reads as follows:

"§125. **Amount of loans, interest, maturity.**—Such loans shall not be for a sum greater than one-half of the income of said county for the preceding year, and all such loans may bear interest not exceeding six percent per annum, and may be renewed from time to time upon the payment of interest, provided that no loan, original of the year shall mature later than February first of the year following, and provided further, that, after the adoption of this Code the borrowing limit herein provided shall be reduced five percent each year for the next succeeding twenty years; no proceeds from any loan made under the provisions of this chapter for which general funds may now be used."

Since the Code of 1940 became effective on May 31, 1941, it becomes necessary to determine whether or not the provisions of Chapter 9, *supra*, in regard to temporary loans, are operative as to the current fiscal year, i.e., the fiscal year 1940-41, or whether they first become operative as to the fiscal year 1941-42, beginning on October 1, 1941, which is the first fiscal year after the adoption of the code. This presents some difficulty, in view of the fact that the county operates on a fiscal year basis beginning on October 1 and ending on September 30 of the year following, and taxes are collected on such basis. In my opinion, it would have been preferable if it had been provided that Chapter 9, *supra*, should first become operative on October 1 immediately following the effective date of the code, as was the case with the original County Financial Control Act, *supra*. However, this was not done, but, on the contrary, Section 125, *supra*, contains the following language: " * * * after the adoption of this Code * * * ." I construe these words to mean

particular year in order to have the right to make a temporary loan during the succeeding year.

Nothing has been said hereinabove about whether or not the reference in Section 125, *supra*, to "the income of said county for the preceding year" means the income from ad valorem taxes for the benefit of the general fund only, the income from ad valorem taxes for the benefit of both the general fund and the road and bridge fund, or the income from all sources, including the part of the proceeds from the state excise tax on gasoline allocated to the counties, the proceeds of the sales tax allocated to the counties, the part of the net profits from the operation of state liquor stores allocated to the counties, etc. This question is closely interrelated with many other questions in regard to the financial operation of the counties which have arisen as a result of changes in the statutory law of this State made by the Code of 1940. I am now engaged in the preparation of an opinion to Hon. Oscar Horton, Judge of Probate, Marshall County, Guntersville, Alabama, in answer to many of these questions, and this question will be answered in the opinion to him, and a copy of the same will be furnished to you.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 17, 1941.

Hon. W. W. Boswell,
Sheriff, Geneva County,
Geneva, Alabama.

Geneva County—Costs and Fees—Fine and Forfeiture Fund—

Act No. 539, H. 1010, approved September 16, 1939 (Local Acts, 1939, page 336), regulating the Fine and Forfeiture Fund of Geneva County, construed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of August 30, 1941, in which you request an official opinion, is as follows:

"I am writing to ask for an opinion with reference to the provisions and effect of H. Bill No. 1010, Local Acts, Legislature 1939, page 336.

"Sec. 1, of said Act, provides:

"The Commissioners Court of Geneva County, is hereby Authorized and required to place to the credit of the Fine & Forfeiture

Fund of said County, \$2,000. each and every year after the passage of this Act, in two installments as follows: \$1,000. on the First day of March, 1940, and \$1,000. on the First day of each March thereafter, and \$1,000. on the First day of September, 1940, and \$1,000. on the First day of each September thereafter.'

"Sec. 2 of said Act provides as follows:

"The treasurer or other custodian of county Funds, is required to apply the funds provided for in Sec. 1, of this Act, and all other funds now in the Fine and Forfeiture Fund of said County, and which may hereafter be paid into said Fine and Forfeiture Fund, from any and all sources, exclusively to the payment of registered State witness certificates and officers script now payable out of Fine and Forfeiture Fund, which are now a claim or which may hereafter become a claim against said County.'

"Sec. 6 of said Act provides:

"The treasurer or other custodian of public funds of said county, shall Ninety days after the passage of this Act begin the payment of all re-registered certificates and officers script in the order of the priority of their re-registration, and shall begin the payment of all other registered witness certificates and officers script in the order of their priority of registration which may be issued after the passage of this Act, and shall continue to pay the same in the order of their registration so long as fund are available therefor.'

"Sec. 10 of said Act provides :

"That all laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.'

"FIRST.

"Is the sheriff and Clerk of the Court, holding re-registered, or registered, Officers script, of priority of re-registration or registration over re-registered or registered State witness certificates, entitled to prior payments over the holders of re-registered or registered State witness certificates, as provided by Sec. 6, of said Act?

"SECOND.

"Does the priority of re-registration or registration of Officers Script authorize the priority of payment of such Officers Script out of the funds placed to the credit of the Fine and Forfeiture Fund, by the County Commissioners as provided by Section 1, of this Act, over re-registered or registered State witness certificates?"

Rather than answer your inquiries categorically, it is deemed advisable to construe the act in question generally, which construction will give the information you desire.

In addition to the sections of the local act in question which are quoted in your letter of inquiry, I wish to call your attention to Sections 4 and 5 thereof, which provide as follows:

"Section 4. Within ninety days after the passage of this Act, owners or holders of Geneva County registered state witness certificates and officers scrip now payable out of Fine and Forfeiture Fund, issued prior to the passage of this Act, shall present such certificates and officers scrip to the treasurer, or other custodian of public funds of said county, for re-registration and the County Treasurer, or other custodian of public funds of said county shall re-register said certificates and officers scrip and keep a complete record of the amounts and dates of the same."

"Section 5. No certificates or officers scrip shall be re-registered as required by Section 4 of this Act after ninety days after the passage of this Act, and all certificates and officers scrip, which have not been re-registered within the ninety days, shall lose their priority of registration, and shall not be paid until all re-registered certificates and officers scrip shall have been paid."

From a careful reading of the entire act, it is my opinion that it was the legislative intent to place registered State witness certificates and registered officers scrip on an equal footing. The act sets up three classes of claims. They are as follows:

- (1) Officers and witness claims which have been re-registered within ninety days after the passage of the act;
- (2) New registered witness and officers claims which accrue after the passage of the act; and
- (3) Old registered officers and witness claims, which accrued prior to the passage of the act, and have not been re-registered.

The three classes of claims, in my judgment, should be paid in the order set out above. In other words, the re-registered claims should first be paid in the order of such re-registration, then the new claims (those arising after the passage of the act) should be paid in the order of their registration, and lastly the old registered claims, which have not been re-registered, in the order of their registration.

This conclusion is reached after a careful consideration of the entire act, with particular reference to the sections above quoted.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 17, 1941.

Hon. J. C. Pattillo,
Clerk, Circuit Court,
Chilton County,
Clanton, Alabama.

1. If a defendant is under bond to await the action of the Grand Jury, which bond was fixed by a committing magistrate, and an indictment is returned against the defendant for the crime charged, and the presiding judge makes no order changing the amount of bond or the defendant has not forfeited the same, this bond automatically carries the case into the Circuit Court from day to day and from term to term until the defendant is discharged by due course of law, and such defendant or his attorney of record is entitled to inspect the indictment at any time after the same has been filed.

2. The original pleadings in a civil suit at law or in equity, the original process issued thereon, all affidavits, bonds given in the course thereof must not be removed from the office of the clerk or register until the same have been recorded; and after recording, if they are removed by either party to the suit or their legal representative, such party must give receipt for same as required by Title 7, Section 7, Code 1940.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your recent request for official opinion is as follows:

"Please give me your opinion on the following statement of facts.

"A. B. is arrested on a warrant sworn out before a Justice of the Peace for a capital offense and has preliminary hearing and is granted bail, which he gives to appear at the next term of the Circuit Court of said county and from day to day and from term to term thereafter until discharged by due course of law to answer any indictment which may be found against him in said Court. He is duly indicted by the Grand Jury for the offense as charged and his bond is not raised by the Judge of the Court. Under Section 95 of Title 30 of the Code of Alabama am I authorized to state immediately to him or his attorney that he has been indicted and to show him or his attorney the indictment, or should I wait a sufficient length of time for the Sheriff to arrest others who have been indicted by the same Grand Jury who are not under bond or whose bonds have been raised?

"Under Section 5, Title 7, would I violate this statute to allow an attorney to take from the office a demurrer, summons and complaint, plea in abatement, or other paper of like character except bonds and affidavits before the same has been recorded?"

My answer to your first inquiry is in the affirmative.

If a defendant is bound over to await the action of the Grand Jury on a preliminary investigation and is later indicted by the Grand Jury for the offense charged and has made bond fixed by the magistrate at the preliminary investigation to await the action of the Grand Jury, this bond automatically carries the case into the Circuit Court for trial and from day to day and from term to term until discharged by law, unless the presiding judge makes a different order as authorized by Title 15, Section 169, Code of 1940, or the defendant has forfeited his bond. Under the circumstances detailed above, the defendant or his attorney would be entitled to see and to read said indictment, regardless of others who may be indicted at the same term of court, Biennial Report, Attorney General 1934-36, page 484, and in permitting this you would not be violating any provisions of Section 95, Title 30, Code of Alabama, 1940.

Answering your second inquiry, I call your attention to the fact that Title 7, Section 5, Code of 1940 is limited by its express terms to civil cases. *Carmichael v. Mathews*, 134 Ala. 210, 32 So. 681.

Under Title 7, Section 5, Code 1940, you are without authority to allow the removal from your office by anyone of the original pleadings in civil suits, at law or in equity, the original process issued thereon, all affidavits and bonds taken in the course thereof, until such papers have been recorded. The pertinent part of this section is as follows:

"§5. *** The original pleading, or the affidavit, or bond, must not be taken from the office of the clerk or register until after the record thereof, and such record forms part of the final record of the cause."

After such papers have been recorded, Section 7, Title 7, Code 1940 allows the removal thereof by an attorney or solicitor of record of a party to the suit, by giving a receipt as set out in said section, and adds a penalty for the loss or misplacing of the same. This section is as follows:

"§7. Taking file in pending suit from office.—The file pertaining to a pending suit must not be taken from the office of the clerk, or register, or judge of probate, except by an attorney or solicitor of record of a party to the suit, upon a receipt in writing signed by such attorney or solicitor, stating the number and title of the cause, and the papers contained in the file. If any of such papers are lost or mislaid before a return of the file, and a surrender of the receipt, the costs of substituting them must be paid by such attorney or solicitor."

Johnson v. Morbley, 157 Ala. 408, 47 So. 590.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 19, 1941.

Hon. Albert W. Gill, Director,
Department of Conservation,
Capitol.

State—Department of Conservation—Budget—Funds—

Moneys received by the Department of Conservation for forestry purposes, as grants or contributions from the Federal Government, counties and private sources, constitute special funds and any unexpended balances thereof at the end of any fiscal year are not subject to reversion to the general fund of the state.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion bearing date of September 16, 1941, is as follows:

"On September 21, 1939, the Governor approved an act of the Alabama Legislature (No. 523-H689—Toomer on page 814, 1939 Acts of Alabama) amending Section 17 of the Department of Conservation Act of 1939, which was approved March 14, 1939. The amending act above referred to provides among other things as follows:

" Any unexpended balance remaining in the Conservation Fund at the end of any fiscal year (except license fees paid by hunters or fishermen) shall be transferred to the General Fund. Nothing in this Act, however, shall require or permit the diversion of either private, county, or Federal contributions for fire protection purposes; and there is hereby created in the State Treasury a special fund to be designated as the "Forest Protection Fund." The Director of Conservation and the State Forester shall deposit in the said Forest Protection Fund all private and county fire protection contributions and all Section 2 Clarke-McNary Law reimbursement funds paid by the Federal Government. All moneys deposited to the credit of this fund shall be held for the benefit of and for expenditure by the Division of Forestry in the Department of Conservation for forest fire protection purposes, and shall not be diverted to any other general or special fund."

"Upon the adoption of the 1940 Code of Alabama, the amending act was re-written by the Code Committee and appears as Title 8, Section 20 thereof. Said Section 20 contains no reference to the Forestry Funds.

"In the meantime the Department of Conservation, Division of Forestry has been receiving sums of money from the Federal Government, from private cooperative sources, and from the several counties of the State for forest fire protection, and for other specified and general purposes by grants, contracts or fees.

"Title 55, Section 74 of the 1940 Code of Alabama provides as follows:

"'Grants received from the federal government.—Nothing in this chapter shall be deemed to authorize or require the allotment, handling, or expenditure of any moneys received as grants from the federal security board or any other agency of the federal government, or the use or disposition of any properties purchased therewith, in a manner contrary to any condition or limitation attached to any such grant.'

"Title 55, Section 103 provides in part as follows:

"'All fees, receipts, and income collected or received by any department . . . of the State shall be paid into the State Treasury . . . to the credit of the general fund of the State. . . . However this article shall not apply to the fees, receipts and income (other than appropriations) of the Department of Conservation, . . . or to any endowment or trust fund or gifts to any such institution . . . and when such allotments are received by such institution, the same shall be deposited in any bank or banks in the State of Alabama, which have been duly designated and qualified as state depositories, for the use and benefit of such institution, and such funds shall be available only on the check of such institution depositing them, which is hereby authorized to withdraw such funds at its discretion.'

"It occurs to me that under Section 74 above cited any earmarked grant from the Federal Government, and under Section 103 above cited any earmarked grant from any one of the several counties or private cooperators, or any fees, receipts, and income, other than appropriations, from any source, is protected from being transferred at the end of the State's fiscal year into the general fund of the State and remains inviolate in a special fund to be expended by the Department of Conservation, Division of Forestry for the purpose for which it was received, or if the proceeds are from general fees, to be expended by the Division for requirements of said Division.

"Please let me have your official opinion regarding the law on this question setting out the Department's rights in maintaining a special fund for the purpose herein referred to."

Assuming that none of the moneys in question are appropriated to your Department by the Legislature of this State, it is my opinion that the said moneys received from the various sources above set out constitute special funds. I find no law providing that any unexpended balances thereof at the end of any fiscal year revert to the general fund of the State.

By virtue of Title 55, Section 103, of the Code of 1940 (the pertinent part of which is quoted in your letter), the funds under consideration, not being appropriations, are exempted specifically from the operation of Article 3 of Chapter 4 (Sections 92-107), of Title 55, of the Code of 1940, which article contains provision for the reversion of unexpended balances

of certain appropriations at the end of any fiscal year to the general fund of the State, viz: Section 104 of Title 55.

Moreover, under Title 55, Section 74, of the Code of 1940 (quoted in your letter), grants from the Federal Government must be expended in accordance with the purpose or purposes of the specific grant.

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Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 22, 1941.

Hon. Hamp Draper, Chief,
Division of Gins & Warehouses,
Department of Agriculture & Industries,
Capitol.

Warehouses—Licenses—Storing of furs and fur coats—

A person, firm or corporation operating a warehouse for the purpose of storing furs and fur coats for hire is liable for the license imposed by Section 616, Title 51, Code of 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated August 19, 1941 follows:

"Mr. Paterson has asked me to secure an official opinion from your department regarding the storing of furs and fur coats under the Alabama Warehouse Law, as to whether such places would be subject to a license.

"We are enclosing a small file regarding this matter and will appreciate your letting us hear from you at an early date."

My answer to your inquiry is in the affirmative.

In this regard, I call your attention to Section 616, Title 51, Code of 1940, which reads as follows:

"§616. Warehouses and yards.—Each person operating a warehouse or yard for the storage of goods, wares or merchandise for hire shall pay an annual license to the state of twenty-five dollars; where such warehouseman also acts as a distributing agent and forwards and distributes the goods stored in such warehouse, and charges for such service, he shall pay an additional license of one hundred dollars."

It is my opinion that a person engaged in the business of storing furs and fur coats for hire comes within the purview of the above quoted Code section, and is liable for the warehouse license therein imposed.

I also call your attention to Section 838, Title 51, Code of Alabama, 1940, which reads as follows:

"§838. Persons, firms, etc., engaging in several businesses. Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

Reading these two sections together, it is my opinion that any person who operates a warehouse for the purpose of storing furs and fur coats for hire, in addition to some other business conducted by such person for which a license has been paid, is nevertheless liable for the warehouse license imposed by Section 616, supra.

In this connection, your attention is called to Code 1940, Title 2, Chapter 1, Article 35, Sections 568-586, which deal with warehouses. Of course, it would be necessary for such a person to comply with the pertinent provisions of this Article before the license levied by Section 616, supra, may be issuer to him by the probate judge.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 22, 1941.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

1. A petition which seeks to have a probate judge call an election under the provisions of Section 68 of Title 29, Code of 1940, to determine whether or not alcoholic liquors and beverages may be legally sold and possessed in a county must be signed by qualified voters numbering at least twenty-five per cent of the number of voters voting at the last general election.

2. It is the duty of the probate judge to check the petition to determine whether or not the signers of such a petition are legally qualified electors.

3. The probate judge should check against current records. It is not sufficient in all instances to check against the last voters list.

Opinion by the Attorney General.

Dear Sir:

Your letter of September 19, 1941, in which you request an official opinion, is as follows:

"A petition has been filed with me to call an election in Barbour County to determine the sentiment of the people, as to whether or not alcoholic beverages can be legally sold in Barbour County.

"The petition is headed: Petitioning An Election in Barbour County Concerning The Sale of Alcoholic Beverages.

"We the undersigned citizens and qualified voters in Barbour County do hereby petition J. F. Laseter, Judge of Probate in Barbour County, to call an election in said County, as provided for in Section 51 of the Alabama Beverage Control Act, House Bill Special Session of the Legislature of Alabama, 1936-37, to determine the sentiment of the people as to whether or not alcoholic beverages can be legally sold or distributed in Barbour County.

"I have set date of said election for October the 30th and notice of publication of said election has been published in the Clayton Record of Clayton, Alabama.

"Someone has asked me if the names contained in the petition are all qualified voters. I wish to know whether or not the names in the petition must be qualified voters. In Section 68 of the New Code the law is not clear on this point. We have no correct up-to-date list showing the qualified voters. The last list was made before the primary in 1940. The next voter's list will be made for the primary of May, 1942. It will be a very difficult and long drawn out task to check each name on this petition to ascertain (sic) whether or not the signers of the said petition are qualified voters. It will be almost impossible at this busy season of the year for me to check each name on the petition. The petition does not show the precinct in which each petitioner votes in.

"I will greatly appreciate it if you will give me your opinion as quickly as possible on the above question."

The provision of statutory law relating to the calling of elections in the several counties of the state to determine whether or not alcoholic liquors or beverages may be legally possessed and sold in such counties is Section 68 of Title 29 of the Code of 1940. The pertinent parts of that section are hereinafter set out:

"Any county in the state may change its classification from wet to dry or from dry to wet under this chapter in the following manner: Upon the petition of 25% of the number of voters voting in the last preceding general election being filed with the judge of probate of said

county, said judge of probate must call an election for said county to determine the sentiment of the people as to whether or not alcoholic beverages can be legally sold or distributed in said county. *** Only qualified voters shall vote in said election."

It is my opinion that in order for you to legally call an election under this section, the petition presented to you must be signed by legally qualified voters of the county, numbering at least twenty-five per cent of the number of persons voting at the last general election. I am enclosing a copy of an opinion rendered by this office on April 8, 1940, to Hon. Chester A. Walker, Judge of Probate of Tuscaloosa County (Quarterly Report of Attorney General, Volume XIX, page 24), which opinion deals with the sufficiency of the petition and the duty of the judge of probate in calling the election. I call your attention to the last paragraph on page 31 of the Quarterly Report just above referred to, wherein the following language is used:

"Your order or call for the election, a copy of which is set out hereinabove, shows affirmatively that you, as judge of probate, ascertained both of these facts, i. e., (1) That the petition was signed by twenty-five per cent of the number of voters voting in the last preceding general election, and (2) that no such election has been held in said county within a period of less than two years prior thereto."

The next paragraph of the opinion says as follows:

"As pointed out above, this you had the authority and duty to do."

It is my opinion that as judge of probate of your county, before you call an election under the provisions of said Section 68 of Title 29, supra, it is your duty to ascertain that the persons who have signed the petition are qualified voters of the county. This conclusion is, in my opinion, definitely borne out by the case of **Williams v. State**, 7 Ala. App. 104, 61 So. 465.

I am also enclosing a copy of an opinion rendered by this office on February 20, 1937 (Quarterly Report of Attorney General, Volume VI, page 82), which opinion deals with the duty of the judge of probate, in an election such as this, to check the names of the persons appearing on the petition with the latest available records showing qualified electors of the county. It is not sufficient in this instance to check against the voters list made for the 1940 elections.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 22, 1941.

Hon. Jno. B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Code 1940, Tit. 51, §619(d)—Filing Tax—Mortgages—

Where mortgagor has executed a mortgage to secure a debt of \$193,000, and subsequently executes additional mortgages, each of them securing only a part of such original debt, each of said additional mortgages is subject to the mortgage filing tax based on the amount of debt secured by it.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of September 9, 1941 follows:

"The Muscle Shoals Land Corporation of Colbert County, Alabama, executed a blanket mortgage to the Investors Syndicate in the sum of \$193,000.00 and filed same for record on June 21, 1941, and paid a mortgage tax on the entire sum. It is my understanding that this mortgage was executed to obtain construction money for the construction of 59 houses under Title VI of the F.H.A.

"Some of these houses have been completed and the Muscle Shoals Land Corporation is now executing individual mortgages on each house in an amount equal to the F.H.A. Commitment on each house. There is actually no consideration for these individual mortgages except the \$193,000.00 upon which mortgage tax has already been paid. The Muscle Shoals Land Corporation contends that it should not have to pay a mortgage tax for these individual mortgages as there was no money loaned on them, but the aggregate of all 59 will total \$193,000.00, the amount of the blanket mortgage which was recorded and upon which tax was paid.

"These mortgages are all executed by the Muscle Shoals Land Corporation to Investors Syndicate just as the original mortgage in the sum of \$193,000.00 was executed.

"Will you kindly advise me whether or not we should charge tax on these individual mortgages."

Under date of September 17, 1941, you further write as follows:

"I wrote you on September 9, 1941, requesting a ruling regarding a mortgage filing tax on mortgages from the Muscle Shoals Land Corporation to Investors Syndicate. The original mortgage of \$193,000.00 upon which the mortgage tax was paid was payable in less than a year, where-

as, these new smaller mortgages, mentioned in the letter, are payable over a period of twenty years, and I write to give you this additional information.

"Please send me a ruling at your earliest convenience."

Code 1940, Tit. 51, §619(d), formerly appearing as bracket (d) Schedule 94 of Section 348 of the 1935 Revenue Act (General Acts, 1935, pp. 256, 479) reads as follows:

"(d) The privilege taxes required by law to be paid on mortgages, deeds of trust, and similar instruments shall not be required on or for the filing of any such instrument, providing additional or **substantial** (sic) security for any indebtedness secured by an instrument previously filing, upon the filing of which the taxes provided by law have been paid or which was filed at a time when no such privilege taxes were required by law, **provided the secured indebtedness remains unchanged in amount and in time of maturity.**" (Emphasis supplied)

The plain purport of the above quoted language would seem to be that, in order for an additional mortgage securing an indebtedness, as to which the mortgage filing tax has been paid, to enjoy the exemption, the debt secured by the original mortgage must remain unchanged both as to amount and as to maturity. Quarterly Report of Attorney General, Vol. XIX, page 181. (Opinion to Hon. J. Lee Smith, Judge of Probate, Chilton County, dated May 24, 1940.)

In that opinion it was held that to enjoy the exemption the later, or "additional security mortgage," must secure the same debt as the original mortgage, that not only must creditor and debtor be the same in both instruments, but there must be identity of amount and maturity of the debt in both. (Page 183.) In that opinion, also, are noted the former opinions of this office.

From your statement of facts it clearly appears that both the amount and the maturity of the debt secured by the original mortgage are different from the amounts and maturities of the debt secured or to be secured by the 59 additional mortgages, although the aggregate indebtedness thereby secured will equal the amount of debt secured by the original mortgage.

Under the plain language of the statute, I am of opinion, therefore, that each of the 59 additional mortgages when offered for record is subject to the mortgage filing tax.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 23, 1941.

Hon. Frank N. Julian,
Superintendent of Insurance,
Department of Commerce,
Montgomery, Alabama.

FOREIGN INSURANCE COMPANY—

1. Not liable for privilege license on existing policies after going into liquidation in court or after withdrawing from the state.
2. Officer or agent liquidating an insolvent company not liable for privilege license unless he continues the insurance business in the state.
3. Collecting premiums securing or suing for recovery of the same or payment of policies does not constitute doing business in the state.
4. The fact that the agent of the insurance company is a foreign insurance company doing business in Alabama does not render such foreign insurance company subject to privilege tax based on gross premiums collected on outstanding policies of the insolvent insurance company.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion, which has been pending in this office for several weeks, is as follows:

“Under a statement of facts submitted by the Washington National Insurance Company of Chicago, we would thank you to advise us whether or not, under the facts stated and the memorandum of the company, this Department could relieve the company of the payment of premium taxes on that portion of the business that has been reinsured from the National Life Insurance Company. For your reference we attach hereto application of the company and memorandum together with numerous citations and opinions of other states.

“Inasmuch as we are anxious to dispose of this question your advices will be greatly appreciated.”

It appears from the record in this file that prior to October 17, 1933, the National Life Insurance Company of the United States of America, an Illinois corporation authorized to do an insurance business, was engaged in the insurance business in this state. On said date a state court of the State of Illinois issued an order in a case then pending wherein the State of Illinois was plaintiff and the National Life Insurance Company of the United States was defendant, appointing Patrick J. Lucey receiver with authority

to take into his possession all the assets and affairs of the defendant company and proceed to liquidate the same. The record further shows that on the 8th day of February, 1934, the said receiver, while said case was pending and with the approval of the court, entered into a written agreement with the Hercules Life Insurance Company, an Illinois insurance corporation. This contract is long, complicated and at times couched in technical language. To reach a correct answer to your question it becomes necessary for us to examine this contract and ascertain its purpose and intent.

The contract shows that the court determined that the National Life Insurance Company was insolvent and that it was for the best interests of the creditors, policyholders and all others interested in the administration of the affairs of the said National Life Insurance Company, that its outstanding policy contracts be assumed or re-insured and protected by some life insurance company with commercial management and that the court selected the Hercules Life Insurance Company for that purpose. It is not practical nor is it within the limits of this opinion to set forth in detail all the provisions of the contract.

It is our conclusion that by virtue of this contract made under the supervision of the court that the Hercules Life Insurance Company became a managing agent or officer of the court for a period of fifteen years at most to liquidate the business and affairs of the insolvent National Life Insurance Company.

From this conclusion it follows that the National Life Insurance Company ceased to do business in this state and that all premiums paid by its policyholders in this state were due to be paid to said Hercules Life Insurance Company as such court agent and, in turn, by it paid into the court fund in said cause. The record in this case further shows that on May 31, 1938, the Hercules Life Insurance Company merged with the Washington National Insurance Company, an Illinois corporation. Under this merger, the latter company assumed all the duties and obligations of the Hercules Life Insurance Company under the agreement hereinabove mentioned. By this merger the Washington National Insurance Company became the managing agent under the direction of the court in liquidating the business and affairs of the National Life Insurance Company for the unexpired period of the fifteen years referred to above. The Washington National Insurance Company is not the owner of the premiums falling due by policyholders in the National Life Insurance Company but such premiums are to go into court in the cause above referred to.

The record further discloses that the Washington National Insurance Company is and has been for many years doing business in this state. This presents the question, in arriving at the amount of privilege license to be paid by the Washington National Insurance Company, does two and one-half per cent on the premiums collected on the existing policies of the National Life Insurance Company form a part of the amount to be paid.

The law in force at the time of the propounding of this question is to be found in the General Revenue Act of 1935, Article XIII, Chapter 8, Schedule 160.4 (Acts, 1935, p. 550). The material part of this law is:

"Every other foreign insurance company including foreign life insurance companies shall pay two dollars and fifty cents (\$2.50) on each one hundred dollars (\$100.00) of the gross premiums received by it or them for business done in this state, whether the same are actually received by said company in this state or elsewhere, during the year ending the thirty-first day of December preceding, less return premiums as a privilege tax for license for doing business in this state during the current year."

These same provisions are to be found in our present code. Code of 1940, Title 51, Section 816.

In the passage of this law, the state was acting under its police powers and not its taxing powers. **Goldsmith v. City of Huntsville**, 120 Ala. 182, 24 So. 509; **Standard Chemical and Oil Company v. City of Troy**, 201 Ala. 89, 77 So. 383; **Frazier v. State Tax Commission**, 234 Ala. 353, 175 So. 402.

The license levy is on the privilege to do business for the current year and nothing else and it is for business done in the state during the current year. The gross premiums are made a mere measure of the amount of privilege license. If the privilege tax sought to be enforced is for a privilege exercised during the year to which the tax relates, it would be necessary that the company was doing business within the state at that time, to wit, the current year. **Provident Savings Life Assurance Society v. Kentucky**, 239 U. S. 103, 111, 60 L. ed. 167.

The levy is made against the company exercising the privilege of doing business. The state has no power to enforce premium excise tax on an insurance company when it has withdrawn from the state and is no longer issuing policies in that state. This is true though the company continues in force previously existing contracts of insurance. **Provident Savings Life Assurance Society of Kentucky**, 239 U. S. 103.

The continuance of insurance contracts on the lives of residents of the state already written by the company does not depend upon the consent of the state nor has the state power to treat the mere continuance of the obligations of such existing policies held by residents of the state transactions of local business justifying the imposition of a privilege tax in the absence of actual conduct of business in the state. The imposition of taxes on premiums collected on policies on residents of the state in pursuance of the state statute after the company has ceased to do business therein is an unconstitutional exercise of power under the due process clause of the Fourteenth Amendment to the Constitution of the United States. **Provident Savings Life Assurance Society v. Kentucky**, 239 U. S. 103, 104.

Under the contract between the receiver and the Hercules Life Insurance Company, the Hercules Life Insurance Company merely had the legal title to the insolvent insurance company's assets for the purpose of administering them in continuing insolvent's outstanding policies during the fifteen-year period. Such assets are in custodia legis while being administered. **Mortland v. Lincoln National Life Insurance Co.**, 25 N. E. (2d) 325 (Ind.).

Our statute levying the privilege tax contemplates that the gross premiums must be on policies made or owned by the company doing the business under the privilege granted. The Washington National Insurance Company does not own the outstanding policies of the defendant, National Life Insurance Company, but is only collecting them for the court. The mere fact that the Washington National Insurance Company happens to be a foreign company doing business in this state does not change the legal principle involved. Moreover, the performance of such services above referred to by the Washington National Insurance Company is not doing business in the state within the meaning of the statute. The business to be done is the soliciting and writing of insurance, and payment of the premiums, while important, is a mere incident to the doing of the business, so are all efforts to collect the premiums, whether through an agent or by the process of court. **Holman v. Durham Buggy Co.**, 200 Ala. 556, 76 So. 914; **Friendlan Bros. v. Deal**, 218 Ala. 245, 118 So. 508; 19 C. J. S. 1507; 20 C. J. S. 50, 51, Section 1835; Couch Insurance Law, Vol. 1, Section 245b.

I am of the opinion that the state cannot take into consideration gross premiums on the National Life Insurance Company's policies in arriving at the amount of the Washington National Insurance Company's privilege licenses.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 23, 1941

Hon. Isaac Johnson, Jr.,
Judge of Probate,
Lawrence County,
Moulton, Alabama.

Courts of County Commissioners—Statute of Frauds—County Property—

1. One in possession of county property under an oral rental contract for a period of three years held not entitled to hold the same against the wishes of the court of county commissioners.

2. Oral rental contract for a period extending beyond a year held void as violation of statute of frauds (Code 1940, Title 20, Section 3).

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion bearing date of September 2, 1941, is as follows:

"Will you please give me an opinion on the following question:

"Our County owns some property which has been being rented to the highest bidder. This property seemingly was rented in fall of 1939 for a period of 3 years, but there was not any contract to this effect and he failed to sign contract in spring of 1940 when presented with contract, setting out condition of his rental. Also there does not appear on the Commissioners Court Minutes anything concerning this rental. Can this man hold this property under these conditions even though he had possession for the year 1941?"

In reply, I wish to refer you to Section 3 of Title 20 of the Code of 1940, which provides in part as follows:

"§3. Certain contracts to be in writing, else void.—In the following cases, every agreement is void, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing:

"(1) Every agreement which, by its terms, is not to be performed within one year from the making thereof. * * *"

You will note that the above quoted provisions of law render the contract outlined in your statement of facts void, since the same was not intended to be performed within a year.

I am assuming, of course, that an oral rental contract was made with the county commission, but it is apparent that no official action of the court of county commissioners took place, since you state that the minutes of the commissioners' court failed to reflect anything concerning this rent.

I wish to further refer you to the case of **Morrison v. Sanders**, 16 Ala. App. 561, 80 So. 135.

The premises considered, it is my opinion that no valid rental contract exists on the property named by you, and that the fact the person named has had possession of the property does not entitle the said person to continue to hold the same as a tenant under a rental contract.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 23, 1941.

Hon. William A. Conrad,
Circuit Court Clerk,
Mobile County,

Circuit Clerk's Minutes and Records of the Circuit Court—

1. Sessions of court take the place of terms of court.
2. The circuit court or judge directs when the sessions are to be held.
3. The minutes of the organization of the court should bear the same date as that of the session of the court being held.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of May 12, 1941, is as follows:

"It appearing to me that the terms of all Circuit Courts have been abolished and that said Courts now have sessions in lieu of terms. In view of this I take it the Courts are open all days of the year.

"I therefore respectfully request Your Honor's opinion on the following questions, viz:

"1. Is it still necessary to show on the minutes the organization of the court?

"2. If your answer to the first question is in the affirmative, on what day of the year should said organization be shown?"

On July 22, 1941, I wrote to you asking you to make your questions more definite. I am in receipt of your letter of the 25th inst. wherein your question No. 1 reads as follows:

"Is it still necessary to show on the **minute book** the organization of the court?"

It is clear from your letters that you are familiar with the duties of keeping minute records, etc. but that you want to know what effect the provisions of the Code of 1940, Title 13, Section 114, have on your duty to show on your minute book the organization of the court.

The above cited provisions of the Code read as follows:

"The circuit courts of the several counties of the state shall be open for the transmission of any and all business or judicial proceedings of every kind at all times."

These provisions make no reference whatever to your duties as to the keeping of minutes of proceedings of court. Under the old law you dated your minutes showing organization of the court as of the date of the term of court being held. The law now requires that the circuit judges provide by written direction to the clerks for the holding of regular and special sessions of court. Code, 940, Title 13, Section 115. From these provisions it appears that sessions of court take the place of terms of court. It necessarily follows that you date your minutes of the proceedings of the court as of the dates fixed by the court for the sessions to be held.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 23, 1941.

Hon. J. W. Heustess, Clerk,
Montgomery County Board of Revenue,
Montgomery, Alabama.

National Guard—Militia—Counties—

Under authority of Code 1940, Title 35, Section 181, counties have authority to make appropriations to units of the Alabama National Guard which are presently inducted into the active military service of the United States.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"For a number of years prior to December 1, 1940, Montgomery County has made monthly appropriations to the Alabama National Guard for its military companies stationed in Montgomery City and County. On or about December 1, 1940, these companies were called into active military service in the United States Army, at which time Montgomery County discontinued these payments to these companies. We now have before the Board of Revenue of this County a petition from these companies requesting that the County continue to pay them during their period of service in the United States Army. Please advise us whether the law of the State of Alabama authorizes the payment of County Funds to military companies while in the active service of the United States Army."

I am of the opinion that your inquiry should be answered in the affirmative.

The authority of counties to appropriate monies to National Guard and Naval Militia units is found in Code 1940, Title 35, Section 181. Said section provides as follows:

"§181. City, county, and other local governing bodies may appropriate organization and maintenance funds for military purposes.—The county commissioners, board of revenue, or other governing body in each county, and the city council and city commissioners or other governing body of a municipality, are hereby authorized and empowered, at their discretion, to appropriate such sums of money as they may deem wise and advisable, not otherwise appropriated, to pay the necessary organization and maintenance expenses, and appropriate monies for the purpose of furnishing by rental or purchase, armories, office furniture and equipments, and lockers, training areas, target ranges, sheds for military vehicles, hangars for airplanes, shelter for army animals and wagons, motor vehicles, artillery carriages and military equipment of every character, including flying fields and similar utilities for military purposes of each detachment, company, troop, battery or group of those organizations such as battalions, squadrons and regiments of the national guard and naval militia located in their respective counties and municipalities, to be accounted for to the governor by the organization receiving such appropriation as herein provided in this chapter for other military funds." (Emphasis supplied)

See Biennial Report of Attorney General, 1934-1936, page 250.

It will be noted that the authorized appropriation by counties and cities under the above quoted section is made to the **units of the National Guard or Naval Militia located in the respective counties or cities**. In my judgment, the words "located in their respective counties or cities" has reference to the home location of the units and not to the temporary location to which said units are called or ordered at any particular time. This disposes of the question as to actual location of the units.

The real question of your inquiry is: Does the fact that said units are presently inducted into the active military service of the United States take them out of the category of units of the National Guard or Naval Militia, as used in Section 181, supra.

In dealing with the question as to the effect of the State Militia being inducted into the Federal service, the following statement appears in 40 Corpus Juris, page 670:

"In the absence of federal legislation affecting the matter there is authority for the view that a unit of the state militia, when mustered into the service of the United States, does not cease to be a part of the militia of the state, and the right of the state to restore to its place as a unit of the organized state militia a body of the National Guard which has enlisted as a unit in the services of the United States has been recognized."

Code 1940, Title 35, Sections 46 and 49, provides as follows:

"§46. **Officers, warrant officers and enlisted men at the termination of war emergency.**—Officers, warrant officers and enlisted men of the national guard and naval militia of Alabama after being called, drafted or ordered into the federal service, shall, upon being relieved from active duty in the military and naval service of the United States, as individuals and units revert to their national guard and naval militia status and shall continue to serve in the national guard and naval militia until the dates upon which their enlistments entered into prior to the call, draft or order into the active service of the United States would have expired if uninterrupted."

"§49. **Organizations temporarily in the United States service to retain state designation.**—During the absence of an organization of the national guard or naval militia of Alabama in the service of the United States, its state designation shall not be given to a new organization."

It is true that a State has no authority or control over its National Guard units presently in the military service of the United States. However, it is my opinion that, in view of the above quoted excerpt from Corpus Juris and Sections 46 and 49 of Title 35, supra, said units do not ipso facto cease to be units of the National Guard upon their induction into the Federal Service. Said units may be considered to have what may be termed "a dual status." When said units are inducted into the Federal service their status as National Guard units remains in a state of suspension. The designation of a unit so inducted cannot be given to any new organization and upon being relieved from active Federal service, the status of said units reverts to their original status. In other words, when a unit is presently inducted into the Federal service, such unit on one hand becomes a part of the Army of the United States, and on the other hand, remains a unit of the National Guard in a suspended status. This suspended status, in my judgment, is sufficient to place said units in the category of **units of the National Guard or Naval Militia** within the contemplation of Section 181, supra. Moreover, I am informed that the units in question are to present contributing to the upkeep of the armory at their home stations. Therefore, in my opinion, counties have authority to make appropriations to the units in question.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 24, 1941.

Hon. G. C. Brittain,
Treasurer, Calhoun County,
Anniston, Alabama.

Hospitals—Guarding prisoners therein—

1. There is no set fee which a county may pay a guard for guarding prisoners while confined to a hospital, the only requirement being that such fee be reasonable.

2. Whether or not such fee is reasonable is a matter which addresses itself to the sound discretion of the county governing body.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion under date of September 20, 1941, follows:

"Reference is made to a ruling of your office on February 25, 1938, that the County has authority to pay guards while guarding a prisoner confined in the hospital under order of the Circuit Judge.

"We have been under the impression that the fee allowed guards in such cases was \$2.00 per day, and accordingly in August 1941 guards were paid at this rate while employed in guarding a prisoner confined in a local hospital under order of the Circuit Court.

"Our attention has now been called to a ruling of your office on July 12, 1939, in which the President of the Board of Revenue of Etowah County was advised that a guard fee of \$5.00 per day was legal.

"Please advise the correct fee that should be paid to guards while employed in guarding a prisoner confined in the hospital under order of the Circuit Judge.

"If \$5.00 per day is the correct fee, may we now pay the guards employed in August 1941 the difference between \$5.00 per day and \$2.00 per day?"

In answer to your first question, you are advised that there is no set or specific fee which a county governing body may pay guards for guarding prisoners while confined in the hospitals under order of the Judge of the Circuit Court.

This fee is payable under the provisions of Section 139 of Title 45, Code of 1940, which is as follows:

"§130. Guards summoned in case of removal.—When prisoners are removed from the jail under the provisions of either of the two preceding sections, the sheriff or jailer has authority, and it is his duty, to summon such guards as may be necessary to insure their safekeeping."

It will be noted from the above quoted Code section that the sheriff is authorized to summon such guards as may be necessary to insure the safe-keeping of prisoners confined in hospitals under the order of the Judge of the Circuit Court. It will further be noted that there is no specific sum or amount set out for this service.

The opinion to which you refer in the above request under date of February 25, 1938, appears in Quarterly Report of Attorney General, Volume

X, page 106, and was addressed to you. It will be noted that no specific amount, in fact no amount whatsoever, is set out in this opinion. The opinion merely holds that fees for the services here considered are legal claims against the county and may be paid by the county.

The opinion to which you refer under date of July 12, 1939, appears in Quarterly Report of Attorney General, Volume XVI, page 32, and was addressed to Hon. J. W. Sharpton, President, Board of Revenue, Etowah County, Alabama. This opinion follows the opinion in Volume X, page 106, and is based upon the holding of that opinion. It just so happened that in the case presented in the Sharpton opinion the fees allowed for a guard were \$5.00 for a day guard and \$5.00 for a night guard. This opinion does not specifically state or hold that \$5.00 is the proper fee to be charged for the services here considered. It was just a coincidence that the fee mentioned in the Sharpton opinion was \$5.00, and had this fee been \$3.00, \$4.00 or \$6.00, the holding in the opinion would have been the same.

Due to the fact that no specific fee is provided for in Section 130, supra, it is my opinion that the Court of County Commissioners or other governing body of the county may pay any reasonable fee for services rendered by persons in guarding prisoners confined in hospitals. The reasonableness of such fee is a matter which addresses itself to the sound discretion of the county governing body.

In answer to your second inquiry, you are advised that if in the sound discretion of the governing body of your county the fee of \$2.00 per day allowed the guards here considered was a reasonable fee, then in my opinion you would not be authorized at this date to pay these guards the sum of \$5.00 per day. While on the other hand, if in the sound discretion of your governing body, \$2.00 per day was not a reasonable fee for the services performed by these guards, then, in my opinion, the county would be authorized to pay any fee, which in the sound discretion of the governing body of your county is reasonable.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 24, 1941.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation—Exemptions—Code 1940, Title 51, §2(a)—Constitution 1901, §91—Church property—

Seven-story building used in part for Sunday School purposes, and in part for other purposes, not exempt from ad valorem taxation.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of September 17, 1941 is as follows:

"The First Baptist Church of Birmingham owns a Sunday School building known as the Education Building. This is a seven-story building with basement and it adjoins the main church building and is used as follows:

"The basement is used by the church. That part of the Southwest corner of the first floor that is South of the first floor main corridor composed of 848 square feet is rented. The remaining 3616 square feet of floor is used by the church. The second, third, fourth and sixth floors are used by the church—the seventh floor is rented. The E½ of the 5th floor is used by the Church. The W½ is rented.

"When the State Tax Commission had three members permanently in Jefferson County, that was from 1933 through 1937, inclusive, Ed. Rosamond, Chairman of the Commission and the writer went to Montgomery and conferred with Henry Long, then Chairman of the State Tax Commission. He authorized Rosamond to come back to Birmingham, measure the space used by the church and to exempt that portion of it from taxation. This practice was followed up to and including the present tax year. This building is situated completely out of the business zone and is owned by the church; however, I am informed that it is heavily mortgaged.

"The Board of Equalization has now seen fit to assess the entire building. The Church contends that the floors and parts of floors exclusively used by it should be exempted. I am thoroughly familiar with Sec. 91 of the Constitution which reads:

"'Must be used exclusively for religious, charitable or educational purposes.'

"but, at the insistence of the Church and its attorneys, I am writing this request for an opinion as to whether to tax the entire building, or only that part that is rented, exempting the part exclusively used by the Church."

The exemption claimed arises in this instance under Section 91, Constitution 1901, and Code 1940, Title 51, §2, exempting from ad valorem taxation "all property, real and personal, **used exclusively for religious worship.**" (Emphasis added).

The constitutional exemption, extends to "lots in incorporated cities or towns, or within one mile of any city or town, to the extent of one acre," and to "lots one mile or more distant from such cities or towns, to the extent of five acres," "with the buildings thereon, when same are used exclusively for

religious worship," and was brought forward in identical form from the Constitution of 1875 (Art. IX, §52).

Thus it appears that in both statute and Constitution emphasis is placed upon exclusive use for religious worship, whether of the "lot with the building thereon" or of "all property, real or personal," as the element essential to the exemption.

The statutory exemption is broader than the constitutional exemption, literally construed, in that the former extends to "all property, real and personal, used exclusively for religious worship," whereas the latter forbids the Legislature to tax lots and the building thereon when so used.

The Legislature was authorized thus to enlarge and extend the exemption referred to in the Constitution, Section 91, *supra*. **State v. Alabama Educational Foundation**, 231 Ala. 11, 163 So. 527.

The problem is therefore to ascertain, if we can, the legislative intent to be inferred from the use of the words, "**all property, real and personal, used exclusively for religious worship.**"

In the present instance the exemption is evidently claimed solely as to the taxpayer's "real property," as defined in the taxing statute, Code 1940, Title 51, §1(b). The statutory definition, however, affords no aid in solution of the problem.

Nor do I find any provision of the taxing statute (Code 1940, Title 51, Chapters 1-4), whereby improved real estate may be divided into fractional parts, for purposes of assessment and taxation, or for purposes of exemption, according to the respective uses of such fractional parts, whether for religious worship or for business, commercial or residential purposes.

I have had the benefit of a splendid brief prepared by eminent counsel representing the Church. In this brief counsel have referred to a number of decisions rendered by the courts of other jurisdictions wherein the conclusion is reached that under constitutional and statutory exemptions similar to ours the portion of a building used exclusively for religious purposes is exempt from taxation, even though other parts of the same building are not used for religious purposes and, therefore, not exempt from taxation.

If the Supreme Court of Alabama had not written to the question of what constitutes "exclusive use" as those words are used in Section 91, *supra*, I would feel inclined to follow the rule laid down by these out-of-state decisions.

The Supreme Court of this state, however, in the case of **Anniston City Land Company v. State**, 185 Ala. 482, 64 So. 110, had under consideration the contention made by the Anniston City Land Company that a piece of property was exempt from taxation because it had been used to a large extent for school purposes, even though it had been occasionally used for other purposes. In that case, the Court found the facts to be as follows:

"The old 'Anniston Inn' was let by the owner for use as a school building during the years for which the State claims taxes; but it now appears that it was not used during those years exclusively for school purposes. It was used as a school; but it also appears to have been used as a lodging and boarding house. The evidence shows to our satisfaction that persons having no connection whatever with the school, and who were not members of the families of the master or his faculty, other families, occasional visitors to Anniston, delegates to conventions, and baseball players, from time to time, **in term time and in vacation**, lodged and boarded in the building. This use was customary and continuous. Indeed, it appears that no respectable white person was ever during the time denied accommodation in the building" (Emphasis added.)

In concluding as to whether or not the above quoted facts constituted an exclusive use for school purposes, the Court said as follows:

"Here, without doubting that the building, or rather, perhaps, the larger part of it, was used in good faith for educational purposes during the period in question, we are of opinion that the different uses to which we have referred, though they must have been induced by the personal convenience or interest of the lessee, cannot in any just and proper sense be said to have proximately contributed to the use of education. They were incidental of course, and it may be that the space so occupied was not needed for the school; **but the property unit was indivisible** and they interfered effectually with that exclusive use for school purposes of exemption from sharing the burdens of the state. The claim of exemption for the building was properly disallowed for the year 1906." (Emphasis added.)

Counsel for the Church argue in their brief that the Anniston City Land Company case, *supra*, is not conclusive of the question involved in this opinion for the reason that the facts which brought the rule in that case into existence are distinguishable from the facts in this case, in that the facts in the Anniston City Land Company case, *supra*, were to the effect that the building was used for school purposes only during the school term and that during the summer months it was used for other purposes, and that in the present case the Church uses that part of the property which they claim exempt from taxation all during the year. In other words, counsel argue that the fact that a part of a building is used for purposes other than religious does not deprive that portion of the property which is used the year round for religious purposes of taxation exemption, while the exemption could not be claimed if the property was used a large portion of the year for religious purposes but none of the property was used for such purposes during a portion of the year, but was used for some other purpose.

As I have heretofore stated, this argument of counsel seems to be well founded in so far as the out-of-state cases are concerned, but I feel that I am constrained to follow the rule laid down in the Anniston City Land Company case, *supra*, as I understand it. In order to determine just what were the facts which brought about the rule in that case, I have not only examined the facts as set out in the opinion of the Court, but I have availed myself of the opportunity to examine the original transcript in the case, and I find that the evidence shows that the property was used for other than school purposes all during the school year as well as during the summer months.

In view of the language used by the Court which I have heretofore quoted, I think it would be presumptuous on my part to say that the conclusion reached by the Court was based on the fact that during the summer months the property was used for other than school purposes and was not also based on the fact that it was used for other purposes during the school term.

It may be that if and when this matter is presented to the Supreme Court of this state that it will see fit to follow the rule laid down by the out-of-state cases cited by counsel for the Church, but until this is done, I feel constrained to follow the decision of the highest Court of this State heretofore cited.

It is my opinion, therefore, that none of the property involved in your letter of inquiry is exempt from taxation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 26, 1941.

Hon. Rufus H. Bethea, Chairman,
Board of Registrars, Jefferson County,
Room 102, Court House,
Birmingham, Alabama.

Board of Registrars—Election Districts—

1. It is not mandatory under the provisions of Section 44, Title 17, Code of 1940, that the Board of Registrars transfer the name of an elector, when such elector moves from one election district into another election district within the same precinct.

2. The word "precinct" as used in Title 17, Code of 1940, does not include the meaning of the words "election district."

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion under date of September 19, 1941, is as follows:

"The Code of Alabama, Title 17, Section 44, last sentence, in part, states: 'When - - - any elector has permanently moved from one precinct to another in any county said board of registrars shall transfer the name of such elector to the registration list of the precinct to which such elector has moved.'

"Title 17, Section 78 states that the word precinct includes the meaning of the word ward or wards.

"Title 17, Section 86 states that where precincts have been subdivided into election districts 'no voter in any elections held thereafter shall vote at any place other than the election district in which said voter is, at such times, registered as a qualified elector.'

"If you have not previously rendered an opinion on the question, I will appreciate a definite opinion as to whether or not it is mandatory that a voter be moved from one election district to another upon sufficient evidence of change of permanent residence, provided the two election districts are in the same precinct. In other words, does the word precinct as used in Title 17, Section 44 include the meaning of 'election district'?"

I have not found an opinion rendered by any of my predecessors on the question presented in your letter of inquiry, nor am I able to find any decision of the Supreme Court of Alabama directly in point.

On matters of this kind, I am sure you understand that your guess is as good as mine. If the question were presented to the Supreme Court of Alabama, in my opinion they could answer your inquiry either in the affirmative or in the negative and support either conclusion with sound reasoning.

It is my judgement, however, that it is not mandatory that a voter be transferred from one election district to another election district within a precinct by the Board of Registrars when such voter has moved from one district to another, in the sense that a failure on the part of the Board of Registrars to make such transfer would deprive the voter of his right to vote.

However, it is my judgement that a careful reading of the election laws of this state as presently drafted indicates that the legislative intent was that the Board of Registrars from time to time should revise the list of voters in each precinct, so as to provide for a voter to vote in the election district in which he is residing.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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